SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 62

PAUL SEYMOUR, PETITIONER

VS.

MERLE E. SCHNECKLOTH, SUPERINTENDENT OF WASHINGTON STATE PENITENTIARY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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601198—61——1

1 In the Supreme Court of the State of Washington

No. 34112

IN THE MATTER OF THE APPLICATION FOR A WRIT OF HABEAS CORPUS OF PAUL SEYMOUR, PETITIONER

v.

MERLE E. SCHNECKLOTH, SUPERINTENDENT OF THE WASHINGTON STATE PENITENTIARY AT WALLA WALLA, WASHINGTON, RESPONDENT

Petition for a writ of habeas corpus

To the Honorable Supreme Court of the State of Washington and the Chief Justice Thereof:

The petition for a writ of habeas corpus of Paul Seymour, the above-named petitioner, respectfully shows this court as follows:

I

That petitioner is a native Indian of the United States and an unemancipated member of the Colville Indian Tribe of the State of Washington and resident citizen thereof, residing at Walla Walla, Washington.

II

That petitioner is imprisoned and illegally restrained of his liberty in the Washington State Penitentiary at Walla Walla by Merele E. Schneckloth, the duly appointed, qualified and acting Superintendent of said penitentiary and the respondent herein named.

III

That petitioner is not committed to the said penitentiary by virtue of any process issued upon a valid final judgment of a Court of competent jurisdiction or for any contempt of a court, officer, or body having authority in the premises to

commit; or upon a warrant issued from the Superior Court upon an information or an indictment.

IV

That the cause and/or pretense for said restraint and imprisonment, to the best knowledge and belief of petitioner, is a purported Judgment and sentence and Warrant of Commitment entered on or about October 15, 1956, in Cause
2 No. 04693 of the records and files of the Superior Court of the State of Washington in and for the County of Okanogan, wherein, upon an information being filed against your petitioner on or about August 27, 1956, and a plea of guilty being entered thereto, it was Ordered, Adjudged and Decreed that your petitioner was guilty. Thereafter the Honorable Judge Joseph Wick Sentenced and committed petitioner to the Washington State Penitentiary for a term of not more than seven and one-half (7½) years on a charge of attempted second degree burglary.

A true and exact, certified, photostatic copy of the Judgment and Sentence being hereby attached and by this reference made a part hereof as fully as though set out herein in full.

V

That the aforesaid Judgment and Sentence is void and the imprisonment of petitioner thereunder is illegal and without authority of law in the following respects:

"That petitioner's incarceration in the Washington State penitentiary is illegal as the Superior Court of the State of Washington had no jurisdiction to issue a Judgment and Sentence and Warrant of Commitment."

VI

That your petitioner being a ward of the United States Government under the jurisdiction of the Bureau of Indian Affairs as defined in Title Twenty-five of U.S.C. (1952 ed.) Chapters 5 and 6, and the purported crime as charged against your petitioner (an Indian) took place in Indian Country as defined in the U.S.C. Title 18 (1952 ed.). See 1152 • • •

Laws Governing * * * U.S.C., Title 18 (1952 ed.). See 1153 "Offense Committed Within Indian Country," and 1151 "Indian Country Defined" and also see the decision of the Supreme Court of the State of Washington in Cause No. 33653, Dept. Two, Nov. L. 1956—Joe Andy v. Delmore for a writ of Habeas Corpus;

Now therefore, petitioner prays that this Honorable Court will grant a hearing on this petition and issue an order to the Respondent commanding him to show cause, if any he hath or can, why this petition should not issue and that he be ordered to have the body of petitioner before the Court on a day cer-
tain therein to be named to receive Judgment as the
3 Court deems just in the premises, or, in the absence of showing, that Respondent be ordered to release petitioner from further illegal confinement.

Respectfully submitted.

(S) Paul Seymour,
PAUL SEYMOUR,
Petitioner.

Duly sworn to by Paul Seymour (jurat omitted in printing).

4 In the Supreme Court of the State of Washington

No. 34112

IN THE MATTER OF THE APPLICATION FOR A WRIT OF HABEAS CORPUS OF PAUL SEYMOUR, PETITIONER

v.

MERLE E. SCHNECKLOTH, SUPERINTENDENT OF THE WASHINGTON STATE PENITENTIARY AT WALLA WALLA, WASHINGTON, RESPONDENT

Return and answer

Filed February 15, 1957

Comes now Merle E. Schneckloth, Superintendent of Washington State Penitentiary at Walla Walla, Washington, by and through his attorneys, John J. O'Connell, Attorney General, and Michael R. Alfieri, Assistant Attorney General, and for

a return and answer to the petition for a writ of habeas corpus in the above entitled court, alleges, admits, and denies as follows:

I

That the respondent has no knowledge or information sufficient to form a belief as to the allegations in Paragraph #1 of the petitioner's application and therefore denies the same.

II

Admits that the petitioner is imprisoned in the Washington State Penitentiary by the respondent; denies that he is illegally restrained.

III

Denies each and every allegation contained in Paragraph 3.

IV

Admits Paragraph #4.

V

Denies each and every allegation contained in Paragraph #5.

VI

That the respondent has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph #6 of the petitioner's application and therefore denies the same.

Wherefore, respondent, having fully answered petitioner's application for a writ of habeas corpus, prays that said application for a writ of habeas corpus be dismissed and respondent discharged from further answer herein.

JOHN J. O'CONNELL,
Attorney General.
MICHAEL R. ALFIERI,
Assistant Attorney General.

Duly sworn to by Michael R. Alfieri (Jurat omitted in printing).

6 In the Supreme Court of the State of Washington

No. 34112

IN THE MATTER OF THE APPLICATION FOR A WRIT OF HABEAS CORPUS OF PAUL SEYMOUR, PETITIONER

v.

MERLE SCHNECKLOTH, SUPERINTENDENT OF THE WASHINGTON STATE PENITENTIARY AT WALLA WALLA, WASHINGTON, RESPONDENT

Order of reference

June 6, 1957

[File endorsement omitted.]

It having been determined by the court, pursuant to Rule 56(5), Rules on Appeal, 34A Wn. (2d) Supp. No. 6, p. 17, that the return and answer herein raise issues of fact which cannot be determined from the face of the record,

It is hereby ordered that the petition and all proceedings had thereon in this court be referred to the superior court of the state of Washington for Okanogan county, to take evidence and report the same to this court, and make findings of fact on the following questions:

(1) At the time of the commission of the offense charged in the information, was the petitioner an enrolled member of any Indian tribe;

(2) Where was the alleged offense committed; specifically, was that place "Indian Country" as defined by Title 18, USC, § 1151;

All subject to examination, consideration, approval, modification or other disposal by this court;

It is further ordered that the petitioner be accorded the right of attending the hearing in person and by counsel and to have the compulsory right of subpoena and the service thereof, as the superior court may order.

Dated this 6th day of June 1957.

By the Court:

(S) MATTHEW W. HILL,
Chief Justice.

7 In the Superior Court of the State of Washington in and for the County of Okanogan

No. 14578

IN THE MATTER OF THE APPLICATION FOR A WRIT OF HABEAS CORPUS OF PAUL SEYMOUR, PETITIONER

v.

MERLE SCHNECKLOTH, SUPERINTENDENT OF THE WASHINGTON STATE PENITENTIARY AT WALLA WALLA, WASHINGTON, RESPONDENT

* * * * *

Statement of facts

Before Hon. Joseph Wicks.

Date: September 30, 1957, at 1:30 p.m.

Appearances: For the Petitioner: Earl K. Nansen, Attorney-at-Law, Omak, Washington. For the Respondent: John J. O'Connell, Attorney General, By Michael R. Alfieri, Assistant, Olympia, Washington.

9 *Statement by the Court*

THE COURT. Gentlemen, you may proceed. There are two questions that have been referred to this court by the Supreme Court of the State of Washington. The issues to be determined: First to determine whether at the time of the commission of the offense or at the time of filing the information, was the petitioner an enrolled member of an Indian tribe? Second, where was the alleged offense committed? Specifically was that place Indian country as defined in Title 18, U.S. Code Section 1151.

PAUL SEYMOUR called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination by Mr. NANSEN:

Q. Your name is Paul Seymour?

A. Yes.

Q. You are the petitioner in this matter before the court at this time, are you not?

A. Yes, sir.

Q. At the present time you are incarcerated in the state penitentiary at Walla Walla, is that correct?

10 A. Yes.

Q. That was pursuant to a previous judgment of this court, was it not, that was entered after your plea of guilty to attempted burglary?

A. Yes.

Q. Prior to the time of your commitment where was your residence, Mr. Seymour? Where did you live prior to the time you were committed?

A. Inchelium.

Q. Is that in Okanogan County?

A. No; Ferry County.

Q. That is property that is under the jurisdiction of the Colville Indian Reservation, is it not?

A. Yes.

Q. Now, this alleged offense on which you were adjudged guilty of attempted burglary occurred on August 25th, 1956, did it not?

A. Yes.

Q. And on August 25th, 1956, would you state whether or not you were an enrolled member of the Colville Indian tribe?

A. Yes.

Q. And you are of the Indian race, are you, Mr. Seymour?

A. Yes.

Q. And were you born a Colville Indian?

11 A. Yes.

Q. And that occurred on what you know as the Colville Indian reservation, is that correct?

A. Yes.

Q. Was that at Inchelium?

A. Omak.

Q. At Omak, Washington?

A. Yes.

Q. And has your name ever been stricken from the rolls of the Colville Indian tribe?

A. No.

Q. At the present time you are still an enrolled member of the Colville Indian tribe?

A. Yes.

Q. Now the alleged crime for which you were committed to the state penitentiary, would you tell us where that occurred?

A. (Witness did not answer.)

Q. With respect to geographical location where did it happen?

A. Omak—East Omak.

Q. In East Omak?

A. Yes.

Q. That would be the portion of the city of Omak that lies east of the Okanogan river, is that correct?

12 A. Yes.

Q. It was a place referred to as the Omak Market, was it not?

A. Yes.

Q. The proprietor of the establishment is Mr. Fred Rusk?

A. Yes.

Q. Do you know that to be a fact?

A. Yes.

Mr. NANSEN. You may inquire.

Cross-examination by Mr. ALFIERI:

Q. Did you testify that you are presently serving a sentence for this crime?

A. Yes.

Q. Haven't you been sentenced on two other prior occasions?

A. (Witness did not answer.)

Q. Have you been sentenced to Monroe or Walla Walla before?

A. Yes.

Q. What years were they?

A. 1956.

Q. What was that crime?

A. Burglary.

Q. Where was that committed?

A. (Witness did not answer.)

13 Q. Can't you recall?

A. (Witness shakes his head.)

Q. What was the previous crime prior to that?

A. That is the only two there were.

Mr. ALFIERI. I have no further questions.

Redirect examination by Mr. NANSEN:

Q. Paul, you weren't committed on any other crime in 1956 other than this one you are talking about, a burglary at the Omak Market, were you?

A. No; it was in 1955.

Q. That was the previous one?

A. (Witness nods his head.)

Q. At the present time you are serving time because of this alleged offense that occurred in 1956 at the Omak Market, are you not?

Mr. ALFIERI. I object to that your Honor as being a conclusion.

The COURT. The objection will be overruled.

By Mr. NANSEN:

Q. Do you know whether or not you are serving time because of the burglary that occurred in 1956 at the Omak Market?

A. Yes.

Mr. NANSEN. That is all.

14 Re-cross-examination by Mr. ALFIERI:

Q. What sentence were you given in 1955, do you know, Mr. Seymour?

A. Fifteen years.

Mr. NANSEN. I am going to object to that line of questioning for the reason I believe this hearing is only for the purposes stated in the court's opening comments.

The COURT. The objection will be sustained.

Mr. ALFIERI. I have no further questions.

Witness excused.

JOHN F. ARKELL called as a witness on behalf of petitioner, being first duly sworn, testified as follows:

Direct examination by Mr. NANSEN:

Q. Will you state your name please?

A. John F. Arkell.

Q. Where do you reside, Mr. Arkell?

A. At the Colville Indian Agency at Nespelem, Washington.

Q. What is your occupation at the present time?

A. Special Officer, U.S. Indian Service.

Q. At the present time you are assigned to the Colville Indian Reservation, are you?

15 A. Yes; Colville and Spokane—both of them.

Q. Both the Colville and Spokane reservations?

A. Yes.

Q. When you work here in the Colville Indian Reservation, is it under the direction of the superintendent, Mr. Floyd Phillips?

A. It is.

Q. Are you familiar with the official rolls of the Colville Indian tribe?

A. I am.

Q. Do you have those rolls pertaining to this petitioner with you today?

A. I do.

Q. Would you advise the court whether or not the petitioner, Paul Seymour, is an enrolled member of the Colville Indian Tribe?

A. From the official roll Paul Seymour is number 2919, born 8/5/36, three-fourths Indian blood.

Q. He was enrolled at the time of birth, was he, Mr. Arkell?

A. Well, I imagine that he was knowing the way they come in.

Q. He was born a member of the Colville Indian Tribe?

A. Yes; that is correct.

Q. Is he still at the present time a member of the

16 Colville Tribe?

A. Yes according to the official rolls.

Q. Would you state whether or not he has been emancipated?

A. No.

Q. Do you know whether or not he is an allottee?

A. No; I don't know that. It don't show that he has an allotment.

Q. On August 25th, 1956, he would have been an enrolled member of the Colville Indian Tribe?

A. That is right.

Q. This information that you are giving is secured from the original official rolls?

A. That is right.

Q. And they are in the custody of the superintendent, Mr. Floyd Phillips?

A. That is right; yes.

Q. That is, the superintendent of the Colville Indian Reservation?

A. Yes.

Mr. NANSEN. You may examine.

Mr. ALFIERI. No questions.

Witness excused.

17 FRED RUSK called as a witness on behalf of petitioner, being first duly sworn, testified as follows:

Direct examination by Mr. NANSEN:

Q. Will you state your name please?

A. Fred J. Rusk.

Q. Where do you reside, Mr. Rusk?

A. Omak.

Q. What is your occupation?

A. Grocer.

Q. What is the name of the establishment that you operate?

A. The Omak Market.

Q. You are the owner and proprietor of that business, are you?

A. Yes.

Q. On August 25th, 1956, were you the owner and proprietor of the Omak Market?

A. Yes.

Q. Where is the Omak Market located, Mr. Rusk?

A. Omak.

Q. In what portion of the town of Omak?

A. East Omak.

Q. That is the portion of the city of Omak which lies east of the Okanogan river?

A. Yes.

18 Q. Would you state the address of your establishment?

A. It is the southwest corner at the intersection of 6th and Jackson, East Omak.

Q. That is 6th Avenue?

A. 6th Avenue and Jackson.

Q. And Jackson Street?

A. Yes.

Q. Did Jackson Street have any other name at any prior time?

A. Originally platted I believe it was by number and was called 10th Street.

Q. So what used to be 10 Street is now Jackson?

A. Yes.

Q. You have seen the plats of the townsite of East Omak so you can tell where your property is, have you?

A. Yes.

Q. Handing you what is marked Plaintiff's Exhibit #1, would you identify that?

A. Yes.

Q. Will you tell me what that is?

A. It is a plat of the townsite of Omak—East Omak.

Q. And would the location of your establishment be on that map?

A. Yes.

Mr. NANSEN. I would like to offer this as an exhibit.

Mr. ALFIERI. What is the purpose of it?

19 Mr. NANSEN. It is for the purposes of illustration and I will have the witness further identify it.

Q. Mr. Rusk will you take a pencil and circle the area where your place of business is located?

A. Lot 9, at the intersection of 6th Avenue and 10th Street on this map. At present it is Jackson.

Q. With respect to the lot and block number would you please state from this map what is the lot and block number?

The COURT. Are you continuing your identification of it?

Mr. NANSEN. Pardon me. I should offer it.

Mr. ALFIERI. I have no objection.

The COURT. It may be admitted.

By Mr. NANSEN:

Q. Now will you tell me from that Exhibit #1 the lot and block number of your property?

A. Block 118, Lot 9.

Q. At the present time you are purchasing that property, are you not?

A. Yes.

Q. Can you tell the court what section, township and range that would be located in?

A. I believe it is 36——

Q. Section 36?

A. Section 36, Range 26, I believe.

20 Q. All of this plat is township 34 north, Range East of the Willamette Meridian. Now is that the township and range where your property is located?

A. Yes.

Q. And it would be in Section 36 of that township and range?

A. Section 36 of that township and range.

Q. That particular portion of Section 36 all lies east of the Okanogan river?

A. Yes.

Q. I believe you stated you were the proprietor on August 25th, 1956?

A. Yes.

Q. You actually were present when there was an attempted burglary upon this establishment by this petitioner, Paul Seymour?

A. Yes.

Q. The offense actually occurred at your place of business there in East Omak?

A. Yes.

Mr. NANSEN. You may inquire.

Cross-examination by Mr. ALFIERI:

Q. You are purchasing this from whom, Mr. Rusk?

A. William Robbins, Jr.

21 Q. He held the fee patent?

A. Yes.

Mr. ALFIERI. No further questions.

Mr. NANSEN. The petitioner rests, your Honor.

Mr. ALPERN. Your Honor, we have nothing to offer in rebuttal. This is merely fact-finding, isn't it?

The COURT. Yes.

Mr. ALPERN. We have nothing further to offer.

After argument of counsel the matter was taken under advisement and on October 22, 1957, the following decision was rendered by the Hon. Joseph Wicks, Judge of the above-entitled court.

Findings of fact on reference from Supreme Court

Petitioner, Paul Seymour, was charged by John Hancock, Prosecuting Attorney, in the above entitled court August 27, 1956, by Information, with the crime of burglary in the second degree. The charging part of the Information is to the effect that petitioner Seymour, with others, did on or about the 26th day of August, 1956, in the town of Omak, Okanogan County, Washington, break and enter a certain building in East Omak, town of Omak, known as the Omak Market, Fred Rusk, proprietor. The petitioner was apprehended by the sheriff of Okanogan County and was arraigned before the above entitled court August 28, 1956; was informed of the
22 nature of the charges against him; counsel was appointed for him and after conferring with his counsel, entered a plea of "not guilty" to the said charge. October 9, 1956, the petitioner was again before the court with his counsel and petitioned the court for permission to withdraw the plea of "not guilty" previously entered. Petition was granted and previous plea of "not guilty" was withdrawn. Prosecuting Attorney then moved the court that the petitioner be permitted to plea to the lesser and included offense of "Attempted Burglary in the Second Degree." Petitioner was then called upon for his plea to the lesser and included offense of Attempted Burglary in the Second Degree charged in the Information, to which he entered his plea of "guilty". Upon his plea of guilty the court found him guilty. The court was informed petitioner was not eligible for probation by reason of previous conviction of a felony. He was thereupon sen-

tenced to the penitentiary of the State of Washington for a period of not more than seven and one-half years.

Thereafter the Board of Prison Terms and Paroles fixed his minimum sentence at seven and one-half years. On the 30th day of September, 1957, he appeared before this court by reason of an order from the Chief Justice of the Supreme Court referring to this court for the taking of testimony and presentation of other evidence for the determination of two facts in connection with his application to the Supreme
23 Court for a Writ of Habeas Corpus. The facts to be determined by the court are:

(1) Was the petitioner a member of the Colville Indian tribe?

(2) Was said offense committed in the "Indian Country" as that term is defined by Title 18 USC Par. 1151?

At said hearing the defendant took the witness stand and was interrogated by his counsel. He testified that on the above-mentioned dates he was an enrolled member of the Colville Indian Tribe and resided at Inchelium, Ferry County, which is on the Colville Indian reservation; that the place where the alleged offense occurred was in East Omak, a part of the town of Omak which is east of the Okanogan river, on property owned by one Fred Rusk, known as the Omak Market; that he was now confined in the penitentiary of the State of Washington by reason of Judgment and Sentence issued out of this court as a result of his conviction of the above-mentioned offense.

Mr. John F. Arkell of the Indian Agency at Nespelem, Washington, a special officer of the United States Indian Service, was called to the witness stand by petitioner's counsel and testified that he had in his possession the official rolls of the Colville Indian Tribes; that he was familiar with said rolls and that said rolls show petitioner Paul Seymour is an enrollee on said records as enrollment number 2919; that he was
24 born August 5, 1936; and was of three-quarters Indian blood; that so far as said records show he is still so enrolled; that the records do not show him to be an Indian allottee.

Mr. Fred Rusk was called to the stand by counsel for petitioner and testified he is and was on the date the offense occurred, purchasing the property where said offense occurred, from a party who holds the fee title thereto; that said premises are located on the southwest corner of 6th Avenue and Jackson Street (formerly 10th Street) in East Omak; that said premises are more particularly described as Lot 9, Block 118 of the government townsite of Omak and situate in Section 36, Township 34, North Range 26 E.W.M.

This concluded testimony offered by petitioner. No evidence was offered by respondent. Counsel for petitioner requested the court to take judicial notice of certain federal statutes and requested one week to present the same. Counsel for the state requested a like period of time after petitioner's presentation of his memorandum of authorities to answer the memorandum of petitioner. These requests were approved by the court.

In determining the facts requested there is no difficulty in determining the first, viz: "At the time of the commission of the offense charged in the Information, was the Petitioner an enrolled member of an Indian Tribe?" Clearly the above establishes this to be a fact. The Petitioner was at the time of the commission of the offense, an enrolled member of the Colville Indian Tribes.

The second question, viz: "Where was the alleged offense committed; specifically, was that place 'Indian Country' as defined by Title 18 USC, Par. 1151?" poses a more complicated question. Under the pertinent statute defining "Indian Country" there are three specific instances designated as "Indian Country". (1) All lands within the limits of any Indian Reservation under the exclusive jurisdiction of the United States Government; (2) all dependent Indian communities within the borders of the United States; (3) all Indian allotments, the title to which have not been extinguished. Under this definition of "Indian Country" the second question requested to be determined is one of both law and facts.

Considering first the facts as they relate to the last two provisions of the statute, the evidence is clear the locus in quo was not in a community of dependent Indians. Neither was

the offense committed on an Indian allotment. The government title to the land where the offense occurred had prior thereto been extinguished. So these two provisions of the statute are eliminated from our consideration.

If the offense was committed in "Indian Country" as defined by #1151 above-mentioned, it will have to be under section (a) that is, on land within the limits of an Indian Reservation under the jurisdiction of the United States gov-
26 ernment, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation. To resolve the question it must first be determined whether the offense was committed on an Indian Reservation under the exclusive jurisdiction of the United States. This can best be done by examination of the proclamation of the President and federal statutes relating to the same. These are the historical facts that are pertinent.

July 2, 1872, the following order was issued by the President of the United States:

"EXECUTIVE MANSION,
"*Washington, July 2, 1872.*

"It is hereby ordered that the tract of country referred to in the within letter of the Commissioner of Indian Affairs as having been set apart for the Indians therein named by executive order of April 9, 1872, be restored to the public domain, and that in lieu thereof the country bounded on the east and south by the Columbia River, on the west by the Okanogan River, and on the north by the British possession, be, and the same is hereby, set apart as a reservation for said Indians, and such other Indians as the Department of Interior may see fit to locate thereon.

"U. S. GRANT."

"See Volume 1, Kappler Indian Affairs, Laws and Treaties, Page 915."

The territory thus was established as a reservation for the Colville Indians and remained in that status until the Act of Congress of July 1, 1892. (Vol. 27 U.S. Stats at Large 62) which provided: That subject to the reservations and allot-

ment of lands in severalty to the individual members
27 of the Indians of the Colville Reservation in the State of Washington therein referred to, all the land in said reservation north of the township line between townships 34 and 35 North of Range 37 East of the Willamette Meridian, "containing by estimation one million five hundred thousand acres, the same being a portion of the Colville Indian Reservation created by executive order dated July second, eighteen hundred and seventy-two, be, and is hereby, vacated and restored to the public domain, notwithstanding any executive order or other proceeding whereby the same was set apart as a reservation for any Indians or bands of Indians, and the same shall be open to settlement and entry by the proclamation of the President of the United States and shall be disposed of under the general laws applicable to the disposition of public lands in the State of Washington."

That the land by said Act of Congress restored to the public domain and opened up for settlement under the homestead laws of the United States is commonly referred to as the "North Half" of the Colville reservation. The remaining portion of said reservation is commonly referred to as the "South Half" or "Diminished Colville Indian Reservation." The locus in quo is in this so-called "South Half of the diminished Colville Indian Reservation.

The above-mentioned Act of Congress further provided in Section 8, as follows:

"That nothing herein contained shall be construed as recognizing title or ownership of said Indians to any part of said Colville Reservation, whether that hereby restored to the public domain *or that reserved by the government for their use and occupancy.*"

No further change in the status of said reservation was made until the Act of Congress of March 22, 1906 (see
28 Vol 34, U.S. Stats. at Large, 80—(Chapter 1126 fifty-ninth Congress Session 1).

"An Act to Authorize the Sale and Disposition of Surplus or unallotted Lands of the Diminished Colville Indian Reservation, in the State of Washington and for other purposes."

The portion of said Act of Congress so far as the same is pertinent to the present issue before the court, provides as follows:

"The Secretary of the Interior be, and he is hereby, authorized and directed * * * to sell or dispose of unallotted lands in the Diminished Colville Indian Reservation.

"(Section 2 provides for an allotment of eighty acres to each member of the tribe.)

"Section 3. That upon the completion of said allotments to said Indians the residue or surplus—that is, lands not alloted or reserved for Indian schools, Agency, or other purposes—of said diminished Colville Indian Reservation * * * shall be open to settlement and entry under the homestead laws * * * by proclamation of the President, * * *

"(Section 6 provides the net proceeds derived from the sale of said surplus land shall be deposited in the U.S. Treasury to the credit of said Indians.)

"Section 7 provides for the reservation of a portion of said surplus lands for an Agency, School, and religious purposes, sawmill, grismill and other purposes.)

"(Section 11 provides portions of said lands might be reserved by the Secretary of Interior for townsite purposes.)"

Under authority of this Act the President did, by proclamation, under date of May 3, 1916, open this, the diminished Colville Indian Reservation (South Half) for entry and settlement under the homestead laws of the United
29 States. (See 4 Kappler's Indian Affairs, Laws and Treaties 966.)

In addition to these above-mentioned authorities there are some decisions that throw some light on the subject. State ex rel Best v. Superior Court, 107 Wash. 238 (181 Pac. 688). This is a case wherein the accused was an Indian of the quarter blood, a member of the Colville Tribe of Indians, and had never severed his tribal relations. He was allotted a tract of land by the United States government in 1914, upon the South Half of the diminished Colville Indian Reservation in Okanogan County, which he had since held and occupied, but the title was held in trust by the federal government. It was alleged the crime of Grand Larceny with which he was charged,

if committed at all, was committed within the limits of the South Half of the diminished Colville Indian Reservation; but it was not claimed the crime was committed upon an Indian allotment or lands within the exclusive jurisdiction of the United States. The accused petitioned the Supreme Court for a Writ of Prohibition to prohibit the Superior Court of Okanogan County from trying the accused upon a charge of Grand Larceny. In that case the court said, among other things, that:

"What is still known as the south half of the diminished Colville Indian reservation is no longer an Indian reservation. By virtue of the Act of Congress of March 22, 1906, the president of the United States, by his proclamation of May 3, 1916, restored all of the south half of the diminished Colville Indian reservation to the public domain, subject only to the reservations and allotments of land in severalty to the individual Indians."

30 The authorities relied upon by the court in reaching this decision are those quoted and above referred to. Moreover an examination of the Presidential Proclamation of May 3, 1916, specifically provides definite lands that are reserved to the use of the Indians. The townsite of Omak is not among those lands so reserved.

In the case of Tooisgah v. United States, 186 Fed. (2) 93, it was held:

"When, however, the tribes occupying the reservation ceded the lands embraced within it to the United States, relinquishing and surrendering 'all their claim, title and interest,' subject to the allotments in severalty, and every allottee was given the benefit of and made subject to the laws, both criminal and civil, of the state or territory, with the gift of citizenship and equal protection of the laws, Section 6 of the Act of February 8th, 1887, 24 Stat. 388, we think it cannot be doubted that Congress thereby intended to dissolve the tribal government, disestablish the organized reservation and assimilate the Indian tribes as citizens."

The cited case differs from the case at bar only in that in the cited case title to the land ceded had been in the Indian tribe whereas in the case at bar the title has never been in the In-

dian, hence the tribe could not cede that to the government which it did not have, but the government could reserve such portion of the public domain as it saw fit for the use and benefit of the Indian and by statute retain exclusive jurisdiction over the same. Under the above-mentioned statutes and proclamations of May 3, 1916, the federal government again diminished the Colville reservation reducing it in size from
that specified by the Act of 1892. See Shore v. Shell
31 Petroleum Corporation, 55 Fed. (2) 696; State ex rel. Irvine v. District Court, 239 Pac. (2) 272.

It is significant in this respect that the records of title to lands on the so-called "South Half" or diminished Colville Indian Reservation so far as they appear in Okanogan County, reveal that: approximately 148,300 acres of these lands are privately owned, title having been acquired from the federal government either under the Homestead Laws or by patent in fee issued to Indian allottees. Approximately 149,500 acres are Indian allotments with title still held in trust by the federal government for the allottees; approximately 342,940 acres is so-called "tribal lands". That is, lands the title to which is held by the government for the use and benefit of the tribe. The federal government retains no jurisdiction, exclusive or otherwise, over the 148,300 acres of privately owned lands within the South Half of what was once the "diminished Colville Indian Reservation."

From the foregoing it is concluded that the place where the crime was committed by the Petitioner is not "Indian Country" as that term is defined in Title 18 USCA Section #1151, the same not being land within the limits of an Indian reservation under the exclusive jurisdiction of the United States government.

Done at Okanogan, Washington, this 22nd day of October, 1957.

Signed: JOSEPH WICKS,
Judge.

32 *Judge's certificate to statement of facts*

STATE OF WASHINGTON,
County of Okanogan, ss:

I, Joseph Wicks, Judge of the Superior Court of the State of Washington, in and for the County of Okanogan, the Judge before whom the above-entitled matter was heard, to-wit: In the Matter of the Application for a Writ of Habeas Corpus of Paul Seymour, Petitioner vs. Merle Schneckloth, Superintendent of the Washington State Penitentiary at Walla Walla, Washington, Respondent, which is cause No. 14,578 in the Superior Court of Okanogan County, Washington;

Do Hereby Certify:

That the matters and proceedings embodied in the foregoing Statement of Facts are matters and proceedings occurring in said cause, and the same are hereby made a part of the record therein;

That the above and foregoing Statement of Facts contains all of the material facts, matters and proceedings heretofore occurring in said cause and not already a part of the record therein, and contains all the evidence, oral and in writing therein;

That the above and foregoing Statement of Facts was duly and regularly filed with the clerk of the said court and thereafter duly and regularly served within the time authorized by law;

That no amendments were proposed to said Statement of Facts excepting such as are embodied therein;

33 That due and regular written notice of application to the court for settlement and certifying said Statement of Facts was made and served upon the defendant, which notice specified the place and time (not less than three days nor more than ten days after the service of said notice) to settle and certify said Statement of Facts.

That the exhibit referred to in said Statement of Facts is directed to be, and hereby is, made a part of said Statement.

Dated at Okanogan, Washington, this .... day of ....., 1957.

JOSEPH WICKS,
Judge.

34 Reporter's Certificate (omitted in printing).

35 In the Supreme Court of the State of Washington

No. 34112, en banc

IN THE MATTER OF THE APPLICATION FOR A WRIT OF HABEAS CORPUS OF PAUL SEYMOUR, PETITIONER

v.

MERLE E. SCHNECKLOTH, SUPERINTENDENT OF THE WASHINGTON STATE PENITENTIARY AT WALLA WALLA, WASHINGTON, RESPONDENT

Opinion

Filed November 19, 1959

Paul Seymour was charged with second-degree burglary allegedly committed in the town of East Omak, Okanogan county, Washington.

When arraigned before the superior court, he appeared in person and by appointed counsel and pleaded "not guilty" to the charge. No jurisdictional issue was raised.

Subsequently, counsel petitioned for leave to withdraw the plea of "not guilty" to the charge of second degree burglary and to enter a plea of "guilty" to the included offense of *Attempted* Burglary in the Second Degree." Permission was granted; the "not guilty" plea was withdrawn and, after consultation with counsel, Seymour pleaded and was adjudged "guilty of the crime of *Attempted* Burglary in the Second Degree." [Italics ours.] He was sentenced to the penitentiary for a period of not more than seven and one half years. Again, no jurisdictional issue was raised; however, in the "Statement of Trial Judge and Prosecuting Attorney" filed fourteen days after the judgment and sentence, Seymour was described as an "Indian and breeds of about defendant's own age."

Paul Seymour filed his petition for a writ of *habeas corpus* in this court, alleging that he was an enrolled member of the Colville Indian tribes and a ward of the United States Government; and that the "purported crime" was committed in "Indian Country", as that term is defined in 18 U.S.C. (1952 ed.) § 1151.

The return and answer to the petition for a writ of *habeas corpus* raised issues of fact that could not be "determined from the face of the record," so this court referred the matter to the trial court. See Rule on Appeal 56(5), RCW Vol. O.

36 "Burglary" is one of the crimes enumerated in the Ten Major Crimes Act; hence, exclusive jurisdiction thereof is in the courts of the United States when the alleged crime is committed by an Indian in "Indian Country." 18 U.S.C. (1952) § 1153. The statute also provides that

"* * * the offense of burglary shall be defined and punished in accordance with the laws of the State in which such offense was committed." 18 U.S.C. (1952 ed.) § 153.

We do not find it necessary, in the instant case, to decide whether attempted burglary in the second degree is within the ambit of the Ten Major Crimes act. Upon our reference, the superior Court of Okanogan county concluded that the crime was not committed on land within the limits of an Indian reservation under the jurisdiction of the United States government, even though it was committed on land within the limits of the "Diminished Colville Indian Reservation."

The trial judge included in his "Findings of Fact on Reference from Supreme Court" an exhaustive analysis of the laws and presidential proclamations applicable to the Colville Indian Reservation.

He said, in part:

"The remaining portion of said reservation is commonly referred to as the 'South Half' or 'Diminished Colville Indian Reservation.' *The locus in quo is in this so-called 'South Half' of the Diminished Colville Indian Reservation.*

* * * * *

"No further change in the status of said reservation was made until the Act of Congress of March 22, 1906 (see Vol. 34, U.S.

Stats. at Large, 80—(Chapter 1126 fifty-ninth Congress Session 1).

"'An Act to Authorize the Sale and Disposition of Surplus or Unallotted Lands of the Diminished Colville Indian Reservation in the State of Washington and for other purposes.'

* * * * *

"Under authority of this Act the President did, by proclamation, under date of May 3, 1916, open this, the diminished Colville Indian Reservation (South Half) for entry and settlement under the homestead laws of the United States. (See 4 Kappler's Indian Affairs, Laws and Treaties 966).

"* * * an examination of the Presidential Proclamation of May 3, 1916, specifically provides definite lands that are not reserved to the use of the Indians. *The townsite of Omak is not among those lands so reserved.*

* * * * *

"Under the above-mentioned statutes and proclamations of May 3, 1916, the federal government again diminished the Colville Reservation reducing it in size from that specified by the Act of 1892. See Shore v. Shell Petroleum Corporation, 55 Fed. (2) 696; State ex rel Irvine v. District Court, 239 Pac. (2) 272.

37 "It is significant in this respect that the records of title to lands on the so-called 'South half' or 'diminished Colville Indian Reservation' so far as they appear in Okanogan County reveal that: approximately 148,300 acres of these lands are privately owned, title having been acquired from the federal government either under the Homestead Laws or by patent in fee issued to Indian allottees. Approximately 149,500 acres are Indian allotments with title still held in trust by the federal government for the allottees; approximately 342,940 acres is so-called 'tribal lands'. That is, lands the title to which is held by the government for the use and benefit of the tribe. The federal government retains no jurisdiction, exclusive or otherwise, over the 148,300 acres of privately owned lands within the South half of what was once the 'diminished Colville Indian Reservation.'

"From the foregoing it is concluded that the place where the crime was committed by the Petitioner is not 'Indian Country' as that term is defined in Title 18 U.S.C.A. Section #1151, the same not being land within the limits of an Indian reservation under the exclusive jurisdiction of the United States government." [Italics ours.]

The case of State ex. rel. Best v. Superior Court, 107 Wash. 238, 181 Pac. 688 (1919), is in point. In that case, a member of the Colville tribe, who has never severed tribal relations, sought a writ of prohibition to prevent the superior court of Okanogan county from trying him on a charge of grand larceny. In denying the writ, this court said:

"• • • What is still known as the south half of the diminished Colville Indian reservation is no longer an Indian reservation. By virtue of the act of Congress of March 22, 1906, the president of the United States, by his proclamation of May 3, 1916, restored all of the south half of the diminished Colville Indian reservation to the public domain, subject only to the reservations and allotments of land in severalty to the individual Indians • • • " State ex rel. Best v. Superior Court, supra, p. 241.

The crime not having been committed in "Indian country", as defined by statute (18 U.S.C. (1952 ed.) § 1151), the courts of the United States did not have exclusive jurisdiction. The Superior court of Okanogan county had jurisdiction of petitioner; hence, the petition for writ of *habeas corpus* is denied.

It is so ordered.

We concur:

WEAVER, C. J.
FOSTER, J.
HUNTER, J.
MALLERY, J.
DONWORTH, J.
ROSELLINI, J.
OTT, J.

We agree that the *locus* of the offense was not in "Indian country" and concur in the result.

HILL, J.
FINLEY, J.

38 Supreme Court of the United States

No. 8 Misc., October Term, 1960

PAUL SEYMOUR, PETITIONER

v.

MERLE E. SCHNECKLOTH, SUPERINTENDENT OF WASHINGTON STATE PENITENTIARY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Order granting Motion for leave to proceed in forma Pauperis and Petition for writ of certiorari

March 6, 1961

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 782 and placed on the summary calendar.

MARCH 6, 1961.

U.S. GOVERNMENT PRINTING OFFICE 1961

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 62

PAUL SEYMOUR,

Petitioner,

vs.

SUPERINTENDENT OF WASHINGTON STATE PENITENTIARY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF FOR THE PETITIONER

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INDEX

SUBJECT INDEX

CITATIONS

CASES:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 62

PAUL SEYMOUR,

Petitioner,

vs.

SUPERINTENDENT OF WASHINGTON STATE PENITENTIARY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF FOR THE PETITIONER

Opinions Below

The Superior Court of the State of Washington in and for the County of Okanogan did not write an opinion. The Superior Court's findings of fact, on reference from the Washington Supreme Court, are found at R. 14-21. The opinion of the Supreme Court of the State of Washington (R. 23-26) is reported at 55 W.2d 109, 346 P.2d 669.

Jurisdiction

The Supreme Court of the State of Washington did not enter a judgment other than its opinion of November 19, 1959 (R. 23-26). The petition for a writ of certiorari was

filed on December 28, 1959, and was granted on March 6, 1961 (R. 27). The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

A question of substitution which it was feared might inhere in the case seems no longer a matter for concern. The original petitions for writs of habeas corpus and certiorari herein were directed against Merle E. Schneckloth, former superintendent of Washington State Penitentiary. Schneckloth resigned and his successor was appointed as superintendent on March 1, 1957, while this case was before the Supreme Court of the state. That court did not, apparently, regard substitution as necessary under its process nor its lack as abating the case, for it proceeded to dispose of the matter on the merits. Present counsel first learned of Schneckloth's resignation about June 9, 1961, and promptly filed with this Court a memorandum questioning whether the cause had abated. The Court appears to have put the matter beyond controversy in its June 20, 1961, amendment of Rule 48 to provide, in substance, that when a public officer is a party to a proceeding in his official capacity and resigns during its pendency, future proceedings shall be in the name of the substituted party who "may be described as a party by his official title rather than by name." Accordingly, petitioner has chosen to list respondent by his title rather than by name in this brief.

Statutes and Other Authorities Involved

The relevant portions of §§ 1151(a), 1153 and 3242 of Title 18 of the United States Code; the Executive Order of July 2, 1872; the Acts of July 1, 1892, April 28, 1904, March 22, 1906; the Presidential proclamation of May 3, 1916; and the Acts of August 31, 1916, and July 24, 1956, are set forth in Appendix A, *infra*, pp. 31-39.

Question Presented

Whether the land upon which the purported crime was committed was, at the time of the offense, within "Indian country" as defined in 18 U.S.C. § 1151(a) even though the land had been patented in fee.

Statement

Petitioner is an enrolled member of the Colville Indian Tribe in the State of Washington (R. 7, 10, 16). He was charged in the Superior Court in and for the County of Okanogan with the crime of burglary in the second degree, the offense allegedly having been committed at the Omak Market in East Omak, Town of Omak, on August 25, 1956 (R. 14). When petitioner was arraigned he pleaded not guilty, but thereafter withdrew his plea and pleaded guilty to the lesser and included offense of attempted burglary in the second degree (R. 14). He was found guilty and was sentenced for a period of not more than seven and one-half years (R. 14-15).

Following his imprisonment, petitioner filed in the Supreme Court of the State of Washington a petition for a writ of habeas corpus alleging, *inter alia*, that the judgment and sentence of the Superior Court and his incarceration in the state penitentiary were illegal and void because he was an Indian ward of the United States, an unemancipated member of the Colville Indian Tribe, and the purported crime occurred in Indian country, citing 18 U.S.C. §§ 1151, 1152 and 1153 (R. 1-3). The return and answer to the petition for a writ of habeas corpus (R. 3-4) raised questions of fact which the Washington Supreme Court referred to the Superior Court to take evidence and make findings as follows (R. 5):

(1) At the time of the commission of the offense charged in the information, was the petitioner an enrolled member of any Indian tribe;

(2) Where was the alleged offense committed; specifically, was that place "Indian Country" as defined by Title 18, U.S.C., § 1151.

A hearing was held before the Superior Court. Petitioner was present and was represented by counsel (R. 6). The testimony developed that petitioner was an enrolled member of the Colville Tribe and the Superior Court so found (R. 7, 10-11, 16).

The testimony also developed that the market, where the offense occurred, was situated in East Omak, that portion of the Town of Omak lying east of the Okanogan River (R. 8, 11, 13). The land on which the market was located was being purchased by one Rusk from one Robbins who held a patent in fee to the land (R. 13).[1]

The offense was committed within the diminished Colville Reservation (south half) as it existed after the north half of the reservation was restored to the public domain and opened up for settlement under the homestead laws in 1892 (R. 18). See diagram, Appendix B, *infra*, p. 40. The south half was opened to entry by the Act of 1906 and the proclamation of 1916. Appendix A, *infra*, pp. 34, 37.

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[1] The Okanogan River formed the west boundary of the Colville Reservation when established by Executive Order of July 2, 1872. 1 Kappler, *Indian Affairs, Laws and Treaties*, p. 916, Appendix A, *infra*, p. 32. See Royce, *Indian Land Cessions in the United States*, Washington Map 1, No. 536. By the Act of July 1, 1892, 27 Stat. 62, Appendix A, *infra*, p. 32, what approximated the north half of the Colville Reservation was "vacated and restored to the public domain" and the portion of the reservation remaining was thereafter referred to as the south half, or diminished Colville Reservation. See Royce, *op. cit.*, Washington Map 2, No. 718.

Undisposed of lands in the south half were restored to tribal ownership by the Act of 1956. Appendix A, *infra*, p. 38.

On the basis of the foregoing facts, the Superior Court concluded that the place where the crime was committed was not in the Indian country because, pursuant to the Act of March 22, 1906 (34 Stat. 80), and the Presidential proclamation of May 3, 1916, Appendix A, *infra*, pp. 34, 37, the diminished Colville Reservation had ceased to be "land within the limits of an Indian reservation under the exclusive jurisdiction of the United States Government" (R. 21).

In so doing, the Superior Court followed *State, ex rel. Best* v. *Superior Court*, 107 Wash. 238, 241, 181 Pac. 688, 689.[2] The Supreme Court of the State of Washington upheld the findings of the Superior Court and denied the petition for a writ of habeas corpus (R. 23-26).

Summary of Argument

The Colville Indian Reservation has been "Indian country" and an Indian reservation under the jurisdiction of the United States since its creation in 1872. The north part (not here involved) was separated by the Act of 1892, but the south, or "diminished" portion, remains "Indian coun-

[2] The *Best* case arose after the opening of the lands of the diminished reservation and involved a member of the Colville Tribe charged with two counts of grand larceny. The Indian sought a writ of prohibition from the Supreme Court of Washington to prevent the Superior Court for Okanogan County from trying him for the offenses. The Indian's defense was that the crimes committed, if any, were committed within the limits of the diminished Colville Reservation and thus were under federal jurisdiction. The Washington Supreme Court sustained state jurisdiction, saying that, since the 1906 Act, the diminished Colville Reservation "is no longer an Indian reservation."

try" within 18 U.S.C. §1151(a). The Act of 1906, which opened surplus lands of the reservation to settlement or other disposition (after issuance of patents in trust to Indians), did not dissolve the reservation or reduce it further in size. This is obvious from the provisions of the Act of March 22, 1906. That Act provided that the United States, acting as trustee for the Indians, would undertake to sell the unallotted and unreserved lands of the reservation and apply the proceeds of sale to the benefit of the Indians. The terms of the Act of 1906 clearly distinguish it from provisions in statutes, treaties or agreements (such as the Act of 1892) which have effected cessions of all or parts of the lands of Indian reservations. The Act of 1892 is an example of a "cession and removal" law. It removes the land, when patented in fee, from the Indian reservation and "Indian country." The Act of 1906 is an example of a "relinquishment in trust" law. It does not remove the land from the Indian reservation or from the "Indian country."

The Supreme Court of the State of Washington sustained state jurisdiction on the basis of its prior holding in *State, ex rel. Best* v. *Superior Court, supra*, p. 5, holding that, as a result of the Act of March 22, 1906, and the Presidential proclamation of May 3, 1916, which implemented it, the "diminished" Colville Indian Reservation had ceased to be "land within the limits of an Indian reservation under the exclusive jurisdiction of the United States Government." In so doing, the Supreme Court of the State of Washington failed to recognize the distinction between the Acts of 1892 and 1906, failed to recognize and give proper weight to legislative and executive recognition of the continued existence of the Colville Reservation, and failed to properly apply 18 U.S.C. § 1151(a), which provides that "all land within the limits of any Indian reservation under the jurisdiction of the United States Govern-

ment, notwithstanding the issuance of any patent . . . " constitutes "Indian country," jurisdiction over which is retained by the United States.

It is clear from many enactments by the Congress and pertinent decisions and opinions of the Department of the Interior that the boundaries of the Colville Indian Reservation have remained constant, except for the deletion of the northern half by the Act of 1892. Even the lands which remained undisposed of following the Act of 1906 were restored to tribal ownership by the Act of July 24, 1956.

Since the Act of 1885, federal jurisdiction has extended to specified offenses committed by Indians anywhere within the limits of Indian reservations. Federal jurisdiction is exclusive and Congress alone may determine when the states may assume jurisdiction. Congress granted contingent permission to states by the Act of 1953, but the State of Washington has not accepted jurisdiction over the Colville Indian Reservation. Accordingly, that State did not have jurisdiction to try petitioner.

The Act of 1906 is similar to the Act of December 21, 1904, 33 Stat. 595, which opened the surplus lands of the Yakima Indian Reservation within the State of Washington for disposition or sale under the public land laws. The Supreme Court of the State of Washington has consistently denied state jurisdiction with respect to major offenses committed by Indians within the Yakima Indian Reservation. It should be required to do so with respect to the Colville Indian Reservation.

ARGUMENT

All Land Within the Limits of the Colville Indian Reservation Is Indian Country.

The Colville Indian Reservation was established by an Executive Order issued by President Grant on July 2, 1872. Its boundaries were fixed as the Columbia River on the east and south, the Okanogan River on the west and the British possessions on the north. 1 Kappler, *Indian Affairs, Laws and Treaties*, p. 916, Appendix A, *infra*, p. 32. It was legally constituted and within the Indian country at that time. *United States* v. *Pelican*, 232 U.S. 442, 445, 449.

By the Act of July 1, 1892, 27 Stat. 62, Appendix A, *infra*, p. 32, approximately one-half of the reservation—the northern half—was ceded by the Indians and "vacated and restored to the public domain."[3] The northern half of the reservation was to be open to settlement and entry following proclamation of the President, except for 80-acre allotments to the Indians residing on that portion of the reservation. The north half is not involved in the present case.

The Act of 1892 left undisturbed the Columbia and the Okanogan Rivers as the east, south and west boundaries of the diminished (south half) reservation.[4] In 1904 Congress authorized construction of a smelter on lands within the diminished Colville Reservation subject to the provision that "The laws regulating intercourse with Indians shall be applicable to the lands set aside under this act so long as the south half of the Colville Reservation remains as an Indian reservation." Act of April 28, 1904, 33 Stat. 567, Appendix A, *infra*, p. 34.

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[3] See *Indian Land Cessions in the United States*, Washington Map 2, No. 717.

[4] East Omak is within the diminished reservation (R. 18).

A. The Act of March 22, 1906, and the Presidential Proclamation of May 3, 1916, Did Not Dissolve the Colville Reservation or Change Its Boundaries

The Supreme Court of the State of Washington held that petitioner was subject to the jurisdiction of the state courts because "The diminished Colville Indian Reservation is no longer an Indian reservation" citing its prior opinion in *State, ex rel. Best* v. *Superior Court*, 107 Wash. 238, 241, 181 Pac. 688, 689 (1919).

The result reached by the Supreme Court of the State of Washington was based upon the premise that the Act of March 22, 1906, and the proclamation of May 3, 1916, had, like the Act of 1892, "again diminished the Colville Reservation reducing it in size from that specified by the Act of 1892" (R. 25-26).

The result achieved by the Supreme Court of the State of Washington is clearly erroneous. It committed error because it followed its previous erroneous determination in *State, ex rel. Best* v. *Superior Court*, 107 Wash. 238, 241, 181 Pac. 688, 689, and by concluding that the purposes and results of the Acts of 1892 and 1906 were similar. An explanation of the differences in those Acts exposes the error.

By the express terms of the Act of 1892, Appendix A, *infra*, p. 32, the north half of the Colville Reservation as established in 1872 was "vacated and restored to the public domain" excepting only allotments made to Indians resident in that area. The proceeds derived from the disposition of the north half were to be placed in the Treasury of the United States for such public use as Congress should determine. § 2, 27 Stat. 63. Under § 6 of the Act of 1906, however, proceeds of land dispositions were to be deposited in the Treasury of the United States to the credit of the Indians of the Colville Reservation and expended for their use. Appendix A, *infra*, p. 35. Unlike the Act of 1892,

the Act of 1906 did not purchase the Indian land; it provided only (§ 9) that the United States was to act as trustee until the land was sold. Appendix A, *infra*, p. 36.

The 1892 statute is an example of the Indian treaties, agreements and statutes which fall in the "cession and removal" pattern whereby the United States obtained absolute and out-right cessions of Indian lands, the Indians usually receiving cash, annuities, or other lands. The 1906 Act is an example of the "relinquishment in trust" approach —the lands not allotted or reserved for specified purposes remained in tribal ownership under the supervision of the United States as trustee until sold or otherwise disposed of. Cohen, *Handbook of Federal Indian Law* (1942), p. 334; Instructions of the Department of the Interior, *Restoration of Lands Formerly Indian to Tribal Ownership*, 54 I.D. 559, 560.

Action under the "cession and removal" pattern removed Indian land from the jurisdiction of the United States to the state. A transaction under the "relinquishment in trust" pattern operated to continue the land in question under the jurisdiction of the United States. In *Ash Sheep Co.* v. *United States*, 252 U.S. 159, 166, which involved provisions of an act relating to the Crow Indian Reservation substantially similar to the provisions of the Act of 1906 involved here, this Court said:

> Taking all of the provisions of the agreement together we cannot doubt that while the Indians by the agreement released their possessory right to the Government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee, and that they did not become "Public lands" in the sense of being

> subject to sale, or other disposition, under the general land laws. *Union Pacific R.R. Co.* v. *Harris*, 215 U.S. 386, 388. They were subject to sale by the Government, to be sure, but in the manner and for the purposes provided for in the special agreement with the Indians, which was embodied in the Act of April 27, 1904, 33 Stat. 352, and as to this point the case is ruled by the *Hitchcock and Chippewa Cases, supra* [.] Thus, we conclude, that the lands described in the bill were "Indian lands" when the company pastured its sheep upon them, ...

The Solicitor of the Department of the Interior has expressly ruled that the surplus lands of the Colville Reservation did not, by the Act of 1906, become public lands of the United States. They were "Indian trust" lands. *Mining Locations on Colville Surplus Lands*, 60 I.D. 318, 320.

Even under the early definition of Indian country, *i.e.*, lands to which the Indian title had not been extinguished, the Colville Reservation remained Indian country after passage of the Act of 1906. Act of June 30, 1834, 4 Stat. 729; *Bates* v. *Clark*, 95 U.S. 204; *Ex parte Crow Dog*, 109 U.S. 556, 561-562.

In short, an Indian reservation, even though subjected to the "relinquishment in trust" pattern, remains Indian country and an Indian reservation under the exclusive jurisdiction of the United States until or unless it is subjected to the "cession and removal" pattern.[3] As this Court stated in *United States* v. *Celestine*, 215 U.S. 278, 285, "when Congress has once established a reservation all tracts in-

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[3] The diminished Colville Reservation was "relinquished in trust"; only the north half (not here involved) was subjected to the "cession and removal" pattern.

cluded within it remain a part of the reservation until separated therefrom by Congress."

It is not necessary to speculate as to the status of the diminished Colville Reservation had all surplus lands been disposed of. Federal Indian policy changed in the decade beginning in 1930. The policy of allotment, which had been in vogue from 1887, and which looked to the gradual extinction of Indian culture, reservations and titles and substitution of white culture, was abandoned.[6] In its place, the federal government inaugurated a new approach to the economic and social advancement of the Indian. The cornerstone of the new approach was the Indian Reorganization Act[7] of June 18, 1934, 48 Stat. 984, which provided, *inter alia*, for the preservation of Indian lands and resources.[8]

Section 1 of the Indian Reorganization Act prohibited further allotments and § 3 authorized the Secretary of the Interior "to restore to tribal ownership the remaining surplus lands of any Indian reservation . . ." where the provisions of the Act were accepted by the tribal owner. Acting under this authorization, the Secretary of the Interior, on September 19, 1934, temporarily withdrew from disposal of any kind the surplus lands of the Colville and other Indian reservations in order to maintain the status quo until permanent restoration to tribal ownership could be effected. Instructions, *Restoration of Lands Formerly Indian to Tribal Ownership*, 54 I.D. 559, 562; opinion of the Solicitor, *Mining Locations in Colville Surplus Lands*, 60 I.D. 318, 320-321.

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[6] See Cohen, *Handbook of Federal Indian Law* (1942), ch. 11, pp. 206-217, for a review of the allotment system, its aims and its failures.

[7] Sometimes referred to as the Wheeler-Howard Act.

[8] S. Rept. No. 1080, 73d Cong., 2d Sess.; Cohen, *op. cit.*, pp. 84-86.

Although it seems clear from the above that the Act of 1906 and the proclamation of 1916 did not remove any of the Colville Reservation from federal jurisdiction, any remaining doubt was dispelled by the Act of July 24, 1956, 70 Stat. 626.[9] By § 1 of that Act, all undisposed of lands of the Colville Reservation dealt with by the Act of March 22, 1906, were "restored to tribal ownership to be held in trust by the United States to the same extent as all other tribal lands on the existing reservation, ..." That Act, approved more than one month prior to petitioner's conviction (R. 44), removes any lingering doubt that the Colville Indian Reservation, as established by the Executive Order of 1872 and modified by the Act of 1892, continued to be Indian country under the jurisdiction of the United States.

Even without such a Congressional restoration, the diminished Colville Reservation remained Indian country—the definition of "Indian Country" in 18 U.S.C. § 1151(a), approved June 25, 1948, encompassed "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of *any patent*." (Emphasis supplied.)

B. The Legislative and Executive Have Repeatedly Recognized the Existence and Extent of the Colville Reservation

Any doubt as to the existence and extent of the Colville Reservation is dispelled by the repeated recognition of the reservation by Congress and the Department of the Interior

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[9] A special act restoring the lands to tribal ownership was required because the Secretary of the Interior was precluded from restoring the lands when, on April 6, 1935, the Colville Indians voted to exclude themselves from the operation of the Indian Reorganization Act of 1934. *Mining Locations on Colville Surplus Lands*, 60 I.D. 318, 321.

since 1906. Congressional enactments have not been perfectly consistent, but the over-all pattern leaves no room for doubt.

1. *Statutes Recognizing Colville Reservation*:—The following Acts of Congress seem pertinent:

(a) The Act of May 18, 1916, 39 Stat. 123, 154-155, authorized a sale of certain land "in the diminished Colville Indian Reservation, in the State of Washington" to the state historical society and authorized an allotment "within the diminished Colville Indian Reservation" to an Indian.

(b) The Act of August 31, 1916, 39 Stat. 672, amended the Act of 1906 by adding a new § 13, as follows:

> That the lands allotted, those retained or reserved, and the surplus lands sold, set aside for town-site purposes, or granted to the State or otherwise disposed of, shall be subject to the laws of the United States prohibiting the introduction of intoxicants into the Indian country until otherwise provided by Congress.

(c) The titles of two bills enacted to extend the time for payment of the purchase price for lands sold under the Act of 1906 referred to the "former Colville Indian Reservation, Washington." Acts of March 11, 1918, 40 Stat. 449, and March 19, 1920, 41 Stat. 535.

(d) On March 13, 1924, 43 Stat. 21, Congress authorized suits to be brought in the Court of Claims by certain Indian tribes residing at various places in the United States, including the Nez Perce residing "upon the Colville Indian Reservation, in the State of Washington . . . ."

(e) On June 29, 1940, 54 Stat. 703, Congress enacted legislation to acquire certain described lands from "within the Spokane and Colville Reservations" for construction of

the Grand Coulee Dam project and reserved to the "Indians of the Spokane and Colville Reservations" certain hunting and fishing rights in the reservoir to be created by the project.

(f) The appropriation acts for the Department of the Interior of June 28, 1941, 55 Stat. 303, 313; July 2, 1941, 56 Stat. 461, 515; June 28, 1944, 58 Stat. 463, 471, provided tribal funds for the acquisition of lands for the "Indians of the Colville Reservation, Washington."

(g) The Act of June 16, 1955, 69 Stat. 141, 143, appropriated funds for the purchase of lands "within the Colville Indian Reservation, Washington" for a reservoir in the Colville Indian irrigation project.

(h) On July 24, 1956, 70 Stat. 626, as noted, *supra*, p. 13, the "undisposed of lands of the Colville Indian Reservation, Washington, dealt with by the Act of March 22, 1906 (34 Stat. 80)," were restored to tribal ownership to be held "as all other tribals lands on the existing reservation . . . ." The Colville Reservation is mentioned repeatedly throughout the Act. The sale and exchange of Indian and private lands were authorized by § 2 for the purpose of consolidating Indian and non-Indian holdings in Ferry and Okanogan Counties but the acquisition of land by the Indians was "limited to lands within the boundary of the reservation."

The Act of July 24, 1956, 70 Stat. 626, expressly referred to the "existing" reservation. That Congress was fully aware of the existence and extent of the Colville Reservation is apparent from the House Report on H.R. 7190, which became the 1956 Act, H.Rept. No. 2080, 84th Cong., 2d Sess. The occasion for the opening of the reservation in 1906 is discussed in the report. It recalled, pp. 2-3, that an agreement, negotiated with "a disputed majority" of the Colville Indians in 1905, provided that the Indians "relin-

quished all their right, title and interest" to the lands of the diminished reservation. The Agreement of 1905 arose from discussions between the Indians and a government agent which also concerned payment for the vacated north half of the reservation. S.Rept. No. 1424, 59th Cong., 1st Sess., on S. 4229 which became the 1906 Act. The House Report on the bill which became the Act of 1956 continues, p. 23: "Some of the Colville Indians feel that their forefathers were badly informed by the Federal Government, probably through misunderstandings in the McLaughlin [government agent] case when they negotiated the 1905 agreement which stipulated that payment for the northern half of their reservation was contingent upon their signing away additional portions of their diminished land base." It was also explained that the Indians made no claim to the northern half of the reservation but wanted their rights in the diminished area clarified.

2. *The Executive Has Consistently Recognized the Existence and Extent of the Colville Reservation*:—The Department of the Interior, the Executive arm charged with administration of Indian Affairs, has repeatedly recognized the existence of the Colville Reservation. This is apparent from its recommendation, incorporated in the Indian Reorganization Act of 1934, that surplus lands be withdrawn from disposition under the public land laws. See *Restoration of Lands Formerly Indian to Tribal Ownership*, 54 I.D. 559, and the opinion, *Mining Locations on Colville Surplus Lands*, 60 I.D. 318, both previously discussed. An extensive opinion by the Department's Solicitor, *Indian Rights in Columbia River Reservoir*, 59 I.D. 147, concerning rights reserved to the Colville and Spokane Indians by the Act of June 29, 1940, 54 Stat. 703, also affirms the continued existence of the reservation.

C. The Boundaries of the Colville Reservation Have Continued Unchanged Since 1892

There has been no change in the boundaries of the Colville Reservation since the northern half of the reservation was added to the public domain by the Act of July 1, 1892, 27 Stat. 62, Appendix A, *infra*, p. 32.

But for the opinion of the Supreme Court of the State of Washington involved here, there would be no question that the boundaries of the reservation had remained constant but for an unpublished memorandum from the Acting Secretary of the Interior to the Commissioner of Indian Affairs, dated September 28, 1939. That opinion, Appendix C, *infra*, p. 41, concluded that the Act of 1906, by authorizing disposition of surplus lands, "had the effect of redefining the boundaries of the [Colville] reservation so as to exclude therefrom" certain lands "located on the outer edge of the reservation."[10] The object of the memorandum appears to have been to permit the introduction of liquor into a construction town, Mason City, located on the Columbia River and populated by workers employed on the Grand Coulee Dam project. Even so, the reasoning supporting the result achieved in that memorandum was repudiated in a Solicitor's memorandum for the Commissioner of Indian Affairs, dated August 7, 1941, Appendix D, *infra*, p. 46.

The Acting Secretary, in his 1939 memorandum, like the Supreme Court of the State of Washington, failed to consider the distinction involved in a "cession and removal" provision (Act of 1892) and a "relinquishment in trust" provision (Act of 1906). The distinction is recognized in the Solicitor's unpublished 1941 memorandum, Appendix D, *infra*, p. 46.

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[10] The memorandum is cited as a memorandum of the Solicitor of the Department of the Interior in Cohen, *Handbook of Federal Indian Law* (1942), p. 356, fn. 76.

The Acting Secretary relied in his 1939 memorandum upon the amendment to the Act of 1906 by the Act of August 31, 1916, 39 Stat. 672, extending the liquor laws to the area affected by the Act of 1906. His reliance was misplaced. The laws prohibiting the introduction of liquor into the Indian country did not apply to fee patented lands within Indian reservations. *Clairmont* v. *United States*, 225 U.S. 551. Considerable of the lands within the Colville Reservation had been disposed of and fee patents issued pursuant to the Act of 1906 (R. 25). Congress merely undertook, by the Act of 1916, to apply the Indian liquor laws in an all-inclusive manner within the Colville Reservation. This is shown by the Senate and House Reports on the bill, H.R. 1557, which became the 1916 amendment to the Act of 1906. H.Rept. No. 996 and S.Rept. No. 798, 64th Cong., 1st Sess. The report of the Department of the Interior, contained in the Senate and House Reports, represented that the principal purpose of the amendment was to provide for certain town-sites within the Colville Reservation. If liquor traffic was to be prohibited on all parts of the Colville Reservation—as Congress apparently desired—the amendment was necessary. The Department's report noted that similar provisions were contained in many contemporary statutes and had "been of great assistance in preventing introduction of liquor into the Indian country." Thus, it is clear that, long subsequent to the 1906 opening of the diminished Colville Reservation, and only three years prior to the decision of the Supreme Court of the State of Washington in the *Best* case, 107 Wash. 238, 241, 181 Pac. 688, 689, the Colville Reservation was recognized as Indian country and as an Indian reservation by the Department of the Interior and the Congress.

In *J. H. Seupelt*, 43 L.D. 267, 268, the Department of the Interior recognized in 1914 that the east, south and west

boundaries of the diminished Colville Reservation were in the Columbia and Okanogan Rivers. This recognition was accepted without qualification in the 1945 opinion of *Indian Rights in the Columbia River Reservoir*, 59 I.D. 147, 152, 162. When the Grand Coulee Dam project was begun, Indian tribal and allotted lands of the Colville Reservation located along the shoreline of the anticipated reservoir were acquired by the United States. Act of June 29, 1940, 54 Stat. 703; 59 I.D. at p. 155. But in the view of the Solicitor, the transfer of title did not alter the reservation boundaries. He said, 59 I.D. at p. 175, fn. 60:

> Even if it were assumed that the Indian titles to the shorelands and the river bed have both been extinguished, it would not necessarily follow that the effect was to redefine the reservation boundaries and thus to exclude the acquired lands. In United States v. Celestine, 215 U.S. 278 (1909), the Court declared in general terms that when land is fee patented it still remains within the limits of the reservation. If this is so, it is difficult to see why acquisition of title by the United States should *ipso facto* terminate the reservation, especially since the Indians still have a limited number of special rights in the areas in question. A reservation is not a grant and has nothing to do with title. Alaska Pacific Fisheries v. United States, 248 U.S. 78, 86 (1918).

Further evidence that a change of title from trust to fee status, whether occasioned by acquisition of land by the United States or by sales to whites following the 1906 Act, did not change the boundaries of the Colville Reservation, is found in the compilation of material relating to Indians prepared by the Legislative Reference Service, Library of Congress, for the House Committee on Public Lands (1950). H.Rept. No. 2503, 82d Cong., 2d Sess., App. II, p. 133. The

Colville Reservation is discussed at pp. 560-561, 788, 1262-1263. The compilation states (p. 788) that there are 22 310 acres of fee patented lands "within" the Colville Reservation. The town of East Omak, where the alleged offense occurred, is described at p. 1262 as one "of the principal Indian settlements within [Colville] reservation . . . ."[11] Map No. 85, Addendum IV of H.Rept. No. 2503 shows the Colville Indian Reservation.

D. All Land Within the Limits of the Colville Indian Reservation, Whether Held in Trust or Fee, Is Within Indian Country

As indicated, there is a considerable body of legislation and case law on the subject of criminal jurisdiction within the Indian country.[12] Certain guide lines have been established. Thus, generally, offenses committed by non-Indians against non-Indians, in the Indian country, where Indians are not involved, are punishable by the states. *United States* v. *McBratney*, 104 U.S. 621; *N. Y. ex rel. Ray* v. *Martin*, 326 U.S. 496. "[I]f the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive." *Williams* v. *Lee*, 358 U.S. 217, 220. Three major statutes confer federal jurisdiction: (1) the Ten Major Crimes Act (18 U.S.C. § 1153), (2) the act extending to Indian country the general laws of the United States as to the punishment of

[11] In a memorandum filed in this case in September, 1960, the Solicitor General stated that the Department of the Interior has continued to recognize the entire diminished or south half of the reservation as the Colville Reservation with the boundaries as they existed after the north half was restored to the public domain in 1892. The Solicitor General states the view of the United States to be that "the land in issue seems to us to be in 'Indian Country.'"

[12] Cohen, *Handbook of Federal Indian Law* (1942), pp. 5-8, 358-365; *Federal Indian Law*, Department of the Interior (1958), pp. 12-17, 307-326.

crimes committed on lands within the sole and exclusive jurisdiction of the United States (18 U.S.C. § 1152), and (3) the Assimilative Crimes Act (18 U.S.C. § 13), incorporating the criminal laws of the states into the laws of the United States.[13]

The area of controversy is whether fee-patented land within the boundaries of an Indian reservation is "Indian country". To state the question another way, may a state, as to fee-patented land within an Indian reservation declared by 18 U.S.C. § 1151(a) to be Indian country, seize jurisdiction and convict an Indian of an offense covered by federal law? The land upon which petitioner's offense occurred is fee-patented (R. 13; memorandum of the Solicitor General filed in this case in September, 1960).

The author[14] of the *Handbook of Federal Indian Law* (1942), p. 359, stated that "It is questionable whether land held by an Indian under a fee patent without restriction is Indian country for purposes of federal criminal jurisdiction; the weight of authority is that the land is not 'Indian country' within the meaning of federal penal statutes." Two cases are cited, *Eugene Sol Louie* v. *United States*, 274 Fed. 47 (C.A. 9) and *State* v. *Monroe*, 83 Mont. 556, 274 Pac. 840. This work was compiled before the amendments of June 25, 1948, c. 645, 62 Stat. 757, and May 24, 1949, c. 139, § 25, 63 Stat. 94, which brought the present wording of 18 U.S.C. § 1151(a).

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[13] *Williams* v. *United States*, 327 U.S. 711. The offense of attempted burglary of which petitioner was convicted, if not within the Ten Major Crimes Act (R. 24), may be punishable under the Assimilative Crimes Act, unless the alleged offense comes within the three exceptions to federal jurisdiction enumerated in 18 U.S.C. § 1152.

[14] Felix S. Cohen, "an acknowledged expert in Indian law." *Squire* v. *Capoeman*, 351 U.S. 1, 8-9.

After the enactment in 1948 of 18 U.S.C. § 1151(a), the Department of the Interior revision of Cohen's handbook, *Federal Indian Law*, p. 310, stated that "the weight of authority is that the land [held by an Indian under fee patent] is not 'Indian country' . . . unless it is within the exterior boundaries of a reservation", citing *Williams* v. *United States*, 215 F.2d 1 (C.A. 9), cert. den. 348 U.S. 938, and *Irvine* v. *District Court*, 125 Mont. 398, 239 P.2d 272. Both of those cases rejected the proposition that ownership of land within a reservation is of any significance. In *In re Andy*, 49 W.2d 449, 302 P.2d 962, the Supreme Court of the State of Washington expressly followed *Irvine*, *supra*, with respect to Indian reservations in its state.[15] Other recent federal court decisions sustaining federal jurisdiction over offenses on fee-patented land within the limits or boundaries of a reservation are *Guith* v. *United States*, 230 F.2d 481 (C.A. 9); and *United States* v. *Hilderbrand*, 190 F.Supp. 283 (D.C. Kan.), aff'd *per curiam sub nom. Hilderbrand* v. *United States*, 287 F.2d 886 (C.A. 10).[16]

The statute involved, 18 U.S.C. § 1151(a), Appendix A, *infra*, p. 31, is clear. It says that all land within the limits of Indian reservations is Indian country "notwithstanding the issuance of any patent . . . ." It would be difficult to find a clearer pronouncement.

The earliest antecedent of 18 U.S.C. § 1151(a) is the Seven Major Crimes Act, § 9 of the Act of March 3, 1885, 23 Stat. 362, 385, the second branch of which provided that:

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[15] Additional Washington decisions are cited, *infra*, at p. 28 of this brief. Other Montana decisions in accord with *Irvine* are *State* v. *Pepion*, 125 Mont. 13, 230 P.2d 961; *Bokas* v. *District Court*, 128 Mont. 37, 270 P.2d 396.

[16] See also *State ex rel. Bear* v. *Jameson*, 77 S. Dak. 527, 95 N.W. 2d 181; *Application of De Marias*, 77 S. Dak. 294, 91 N.W.2d 480.

> . . . all such Indians committing any of the above crimes [murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny] against the person or property of another Indian or other person within the boundaries of any State of the United States, and *within the limits of any Indian reservation*, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.[17] (Italics added.)

The Act of 1885 was passed as a result of the decision in *Ex parte Crow Dog*, 109 U.S. 556, holding that the jurisdiction of the United States did not extend to offenses by one Indian against another Indian within the Indian country.[18] The validity of the act was sustained in *United States* v. *Kagama*, 118 U.S. 375. This Court said (p. 383) that the act "does not interfere with the process of the State courts within the reservation, nor with the operation of State laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation."

Prior to the enactment of the Seven Major Crimes Act in 1885, the criminal laws relating to offenses by Indians referred to offenses committed "in the Indian country," R.S. §§ 2145, 2146. Prior to 1885, the term "Indian country" had been interpreted, with reference to the definition in the Act of June 30, 1834, 4 Stat. 729, as being land to which the Indian title had not been extinguished. *Bates* v. *Clark*, 95

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[17] The list of offenses was increased to ten by additions on March 4, 1909, 35 Stat. 1088, 1151, and June 28, 1932, 47 Stat. 336, 337.

[18] Tribal jurisdiction over such offenses from earliest times was recognized in § 2 of the Act of March 3, 1817, 3 Stat. 383.

U.S. 204; *Ex parte Crow Dog*, 109 U.S. 556, 561-562. In the Seven Major Crimes Act, Congress used the words "within the limits of any Indian reservation" instead of the term "Indian country."

Later, in *United States* v. *Celestine*, 215 U.S. 278, *supra*, p. 11, this Court sustained federal jurisdiction over an Indian charged with murder committed on patented land within the Tulalip Reservation in the State of Washington. The patent provided for cancellation if the Indian patentee ceased to occupy or till the land but that was not a material fact as the Court explained in discussing the difference between "reservation" and "Indian country" (215 U.S. 278, 285):

> . . . But the word "reservation" has a different meaning, for while the body of land described in the section quoted as "Indian country" was a reservation, yet a reservation is not necessarily "Indian country." The word is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide, and when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress.

In *Clairmont* v. *United States*, 225 U.S. 551, this Court denied the application of the laws prohibiting the introduction of liquor "into the Indian country" in a situation where the alleged offense occurred on a railroad right-of-way granted by Congress through an Indian reservation. Because the grant had extinguished the Indian title, the right-of-way was not Indian country.

Subsequent state decisions such as *State* v. *Big Sheep*, 75 Mont. 219, 243 Pac. 1067, and *State* v. *Johnson*, 212 Wis. 301, 249 N.W. 284, relied upon *Clairmont*, *supra*, in upholding state jurisdiction over Indians whose offenses occurred on fee-patented land within an Indian reservation. Those cases did not recognize the difference between the use of "Indian country" in the Indian liquor statutes and "within the limits of any Indian reservation" in the Major Crimes Act. The difference was recognized in *United States* v. *Frank Black Spotted Horse*, 282 Fed. 349, 353-354 (S. Dak.), where the court pointed out the considerable difficulties in fixing reservation boundaries and determining the jurisdiction of the courts if boundaries and jurisdiction were affected by the constant changes in title as fee patents are issued from time to time. As the Solicitor of the Department of Interior pointed out, *Patents in Fee*, 61 I.D. 298, 304, law enforcement officers would have to be armed with tract books to ascertain jurisdiction.

In 1932, the Major Crimes Act was amended and Congress used the words "on and within any Indian reservation . . . including rights of way running through the reservation" to describe the extent of federal jurisdiction over the ten major crimes. Act of June 28, 1932, 47 Stat. 336. This amendment was in accord with the reasoning in *United States* v. *Celestine*, 215 U.S. 278, 285, that all tracts within a reservation remained parts of the reservation until separated therefrom by Congress. It should have removed the confusion in some state cases where state jurisdiction was upheld because "Indian title" had been extinguished. In any event, any possible doubt remaining as to federal jurisdiction over fee-patented lands, other than rights-of-way, within the limits of Indian reservations, is answered by the insertion in 18 U.S.C. § 1151(a), Appendix A, *infra*, p. 31, of the words "notwithstanding the issuance of any patent"

in the definition of "Indian country" as "all lands within the limits of any Indian reservation under the jurisdiction of the United States Government . . . ."[19] Federal jurisdiction is exclusive, 18 U.S.C. §§ 1153, 3242.

The overriding reason for retaining federal jurisdiction throughout an Indian reservation was noted in *United States* v. *Soldana*, 246 U.S. 530, 533, to be the protection of the Indian wards of the federal government. In *Worcester* v. *Georgia*, 6 Pet. 515, 561, this Court, through Chief Justice Marshall, held that the State of Georgia's assertion of power within the lands of the Cherokee Nation to prevent a white man, licensed as a missionary by the federal government, from going into Cherokee area was invalid. This Court reasoned (p. 561):

> The Cherokee nation . . . is a distinct community, occupying its own territory, . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is by our constitution and laws, vested in the government of the United States.

And in *United States* v. *Kagama*, 118 U.S. 375, which sustained the constitutionality of the Seven Major Crimes Act of 1885, this Court said (pp. 384-385):

> The power of the General Government over these remnants of a race once powerful, now weak and

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[19] The Indian liquor laws continue to exclude rights-of-way within Indian reservations from their application. 18 U.S.C. §§ 1154(c), 1156. The Indian liquor laws, 18 U.S.C. §§ 1154(c) and 1156, also exclude from their application "fee-patented lands in non-Indian communities." In these respects, they differ from the definition of "Indian country" in 18 U.S.C. § 1151.

> diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

The federal policy and the power over the affairs of its Indian wards is reviewed, most recently in *Williams* v. *Lee*, 358 U.S. 217, 220-221, where it was said:

> . . . Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American society. This policy contemplates criminal and civil jurisdiction over Indians by any State ready to assume the burdens that go with it as soon as the educational and economic status of the Indians permits the change without disadvantage to them. See H.R. Rep. No. 848, 83d Cong., 1st Sess. 3, 6, 7 (1953). Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester* v. *Georgia* had denied.

Congress in 1953 consented to assumption by states of jurisdiction over criminal and civil matters involving Indians, Act of August 15, 1953, §§ 6, 7, 67 Stat. 588, 590, but there are burdens which some states have not been willing to assume. The legislature of the State of Washington has conditioned its assumption of jurisdiction upon Indian consent and, with respect to the "Colville, Spokane, or Yakima Tribes or Reservations," has specified that the resolutions of the Tribal Councils consenting to state assumption of jurisdiction must be ratified by a two-thirds majority of the adult enrolled tribal members. Laws of 1957, Chapter 240 (RCW 37.12.020). The Indians of the

Colville Reservation have not assented to state jurisdiction. As of May 5, 1960, only nine of the twenty-one tribes in the State of Washington had given their consent. *White* v. *Schneckloth*, —— W.2d ——, 351 P.2d 919. At the time of the crime allegedly committed by petitioner, under the laws of the United States and of the State of Washington, the state did not have jurisdiction to try petitioner for the alleged offense.

E. The Supreme Court of the State of Washington Has Correctly Interpreted the Law Relating to the Yakima Reservation; Its Interpretation of the Colville Statutes Should Accord the Same Treatment

In at least six instances, the Supreme Court of the State of Washington has discharged from state custody Indians whose offenses were committed within the boundaries of the Yakima Indian Reservation. *In re Andy*, 49 W.2d 449, 302 P.2d 962; *In re Monroe*, 55 W.2d 107, 346 P.2d 667; *In re Wesley*, 55 W.2d 90, 346 P.2d 658; *In re Charley*, —— W.2d ——, 348 P.2d 977; *White* v. *Schneckloth*, —— W.2d ——, 351 P.2d 919; and *Arquette* v. *Schneckloth*, —— W.2d ——, 351 P.2d 921. *Monroe* involved an offense committed in the town of Wapato; the others in the City of Toppenish, both within the Yakima Reservation.

The Act of December 21, 1904, 33 Stat. 595, authorized allotments to every member of the Yakima Tribe and authorized disposition of the remaining lands not allotted or reserved, much as did the Act of March 22, 1906, for the Colville Reservation. As will be seen from a comparison of the two statutes shown in Appendix E, *infra*, p. 50, the 1904 Act provided that all of the lands were to be disposed of, the United States agreed to serve as trustee, and was to apply the proceeds to the benefit of the Indians. On May 6, 1910, 36 Stat. 349, a new Section 11 was added to the Act of 1904 extending Indian liquor laws

to the Yakima Reservation for a 25-year period. A similar provision without a 25-year limitation was added to the 1906 Colville Act by the amendment of 1916,[20] 39 Stat. 672. There is no valid distinction between the two statutes. The decisions of the Supreme Court of the State of Washington treating the Yakima Reservation as Indian country are eminently correct. That court's failure to reconsider *State, ex rel. Best* v. *Superior Court*, 107 Wash. 238, 241, 181 Pac. 688, 689, particularly in the light of its more recent opinions dealing with the Yakima Reservation, constitutes error.

The Washington court recognized the existence of the Colville Indian Reservation in *State ex rel. Adams* v. *Superior Court*, —— W.2d ——, 356 P.2d 985, 987, 988, involving custody of minor Indian children residing on an allotment on the reservation. Petitioner's alleged offense occurred on fee land, but all land within an Indian reservation is Indian country. 18 U.S.C. § 1151(a).

Conclusion

For the foregoing reasons, the ruling of the Supreme Court of the State of Washington is erroneous and should be reversed and that court instructed to grant petitioner's application for habeas corpus.

Respectfully submitted,

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[20] The purpose of the amendment is explained by the Department of the Interior in H.Rept. No. 996 and S.Rept. No. 798, 64th Cong., 1st Sess., discussed, *supra*, p. 18.

APPENDIX A

Statutes and Other Authorities Involved

Jurisdictional Statutes:

Relevant portions of statutes relating to crimes in the Indian country are as follows:

18 U.S.C. 1151(a):

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, ...

18 U.S.C. 1153:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
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> As used in this section, the offense of burglary shall be defined and punished in accordance with the laws of the State in which such offense was committed.

18 U.S.C. 3242:

> All Indians committing any of the following offenses, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny on and within the Indian country shall be tried in the same courts,

and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

Statutes and Other Authorities Relating to the Colville Indian Reservation:

Relevant portions of statutes, the Executive Order of July 2, 1872 and the Presidential proclamation of May 3, 1916, concerning the Colville Indian Reservation:

Executive Order of July 2, 1872, 1 Kappler, Indian Affairs, Laws and Treaties (1904), p. 916:

It is hereby ordered that the tract of country referred to in the within letter of the Commissioner of Indian Affairs as having been set apart for the Indians therein named by Executive order of April 9, 1872, be restored to the public domain, and that in lieu thereof the country bounded on the east and south by the Columbia River, on the west by the Okanagan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.

Act of July 1, 1892, 27 Stat. 62:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subject to the reservations and allotment of lands in severalty to the individual members of the Indians of the Colville Reservation in the State of Washington herein provided for, all the following described tract or portion of said Colville Reservation, namely: Beginning at a point on the eastern boundary line of the Colville Indian Reservation where the township line between townships thirty-four and thirty-five north, of range thirty-seven east, of the Willamette meridian, if extended west, would intersect the same, said point being in the middle of the channel of the Columbia River, and running thence west parallel with the forty-ninth parallel of latitude to the western

boundary line of the said Colville Indian Reservation in the Okanagon River, thence north following the said western boundary line to the said forty-ninth parallel of latitude, thence east along the said forty-ninth parallel of latitude to the north-east corner of the said Colville Indian Reservation, thence south following the eastern boundary of said reservation to the place of beginning, containing by estimation one million five hundred thousand acres, the same being a portion of the Colville Indian Reservation created by executive order dated July second, eighteen hundred and seventy-two, be, and is hereby, vacated and restored to the public domain, notwithstanding any executive order or other proceeding whereby the same was set apart as a reservation for any Indians or bands of Indians, and the same shall be open to settlement and entry by the proclamation of the President of the United States and shall be disposed of under the general laws applicable to the disposition of public lands in the State of Washington.

Sec. 2. That the net proceeds arising from the sale and disposition of the lands to be so opened to entry and settlement shall be set apart in the Treasury of the United States for the time being, but subject to such future appropriation for public use as Congress may make, and that until so otherwise appropriated may be subject to expenditure by the Secretary of the Interior from time to time, in such amounts as he shall deem best, in the building of schoolhouses, the maintenance of schools for such Indians, for the payment of such part of the local taxation as may be properly applied to the lands allotted to such Indians, as he shall think fit, so long as such allotted lands shall be held in trust and exempt from taxation, and in such other ways as he may deem proper for the promotion of education, civilization, and self-support among said Indians.

* * * * *

Act of April 28, 1904, 33 Stat. 567:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed to permit the Kellar and Indiana Consolidated Smelting Company, a corporation organized under the laws of the State of Washington, to construct a smelter in the immediate vicinity of the San Poil River, in the south half of the Colville Indian Reservation; that the smelter shall be located on the San Poil River, and that permission be granted to construct a flume from the site of the smelter to a point on the San Poil River where a water supply can be made available; that six acres of land be set aside for the site of the smelter, and a strip of land of sufficient width allowed for the erection and construction of the flume; that permission shall be given to the Kellar and Indiana Consolidated Smelting Company to purchase timber and stone necessary for the work of construction; that the Secretary of the Interior shall permit the work to be done under such rules and regulations as he may prescribe, and he shall also prescribe the prices the said Kellar and Indiana Consolidated Smelting Company shall pay for the land, the stone, and the timber used in the construction work: *Provided*, That the laws regulating intercourse with Indians shall be applicable to the lands set aside under this Act, so long as the south half of the Colville Reservation remains as an Indian reservation.

Act of March 22, 1906, 34 Stat. 80-82:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of unallotted lands in the diminished Colville Indian Reservation, in the State of Washington.

Sec. 2. That as soon as the lands embraced within the diminished Colville Indian Reservation shall have

been surveyed, the Secretary of the Interior shall cause allotments of the same to be made to all persons belonging to or having tribal relations on said Colville Indian Reservation, to each man, woman, and child eighty acres, and upon the approval of such allotments by the Secretary of the Interior, he shall cause patents to issue therefor under the provisions of the general allotment law of the United States.

Sec. 3. That upon the completion of said allotments to said Indians the residue or surplus lands—that is, lands not allotted or reserved for Indian school, agency, or other purposes—of the said diminished Colville Indian Reservation shall be classified under the direction of the Secretary of the Interior as irrigable lands, grazing lands, timber lands, mineral lands, or arid lands, and shall be appraised under their appropriate classes by legal subdivisions, with the exception of the lands classed as mineral lands, which need not be appraised, and which shall be disposed of under the general mining laws of the United States, and, upon completion of the classification and appraisement, such surplus lands shall be open to settlement and entry under the provisions of the homestead laws at not less than their appraised value in addition to the fees and commissions now prescribed by law for the disposition of lands of the value of one dollar and twenty-five cents per acre by proclamation of the President, which proclamation shall prescribe the manner in which these lands shall be settled upon, occupied, and entered by persons entitled to make entry thereof . . . .

* * * * *

Sec. 6. That the proceeds not including fees and commissions arising from the sale and disposition of the lands aforesaid, including the sums paid for mineral and town-site lands shall be, after deducting the expenses incurred from time to time in connection with the allotment, appraisement, and sales, and surveys, herein provided, deposited in the Treasury of the United States to the credit of the Colville and confederated tribes of Indians belonging and having tribal

rights on the Colville Indian Reservation, in the State of Washington, and shall be expended for their benefit, under the direction of the Secretary of the Interior, in the education and improvement of said Indians, and in the purchase of stock cattle, horse teams, harness, wagons, mowing machines, horserakes, thrashing machines, and other agricultural implements for issue to said Indians, and also for the purchase of material for the construction of houses or other necessary buildings, and a reasonable sum may also be expended by the Secretary, in his discretion, for the comfort, benefit, and improvement of said Indians: *Provided,* That a portion of the proceeds may be paid to the Indians in cash per capita, share and share alike, if, in the opinion of the Secretary of the Interior, such payments will further tend to improve the condition and advance the progress of said Indians, but not otherwise.

* * * * *

Sec. 8. That the Secretary of the Interior is hereby vested with full power and authority to make all needful rules and regulations as to the manner of sale, notice of same, and other matters incident to the carrying out of the provisions of this Act, and with authority to reappraise and reclassify said lands if deemed necessary from time to time, and to continue making sales of the same, in accordance with the provisions of this Act, until all of the lands shall have been disposed of.

Sec. 9. That nothing in this Act contained shall be construed to bind the United States to find purchasers for any of said lands, it being the purpose of this Act merely to have the United States to act as trustee for said Indians in the disposition and sales of said lands and to expend or pay over to them the net proceeds derived from the sales as herein provided.

Sec. 10. That to enable the Secretary of the Interior to survey, allot, classify, appraise, and conduct the sale and entry of said lands as in this Act provided the sum of seventy-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated,

from any money in the Treasury not otherwise appropriated, the same to be reimbursed from the proceeds of the sales of the aforesaid lands: *Provided*, That when funds shall have been procured from the first sales of the land the Secretary of the Interior may use such portion thereof as may be actually necessary in conducting future sales and otherwise carrying out the provisions of this Act.

• • • • •

Presidential Proclamation of May 3, 1916, 39 Stat. 1778:

I, Woodrow Wilson, President of the United States of America, by virtue of the power and authority vested in me by the Act of Congress approved March 22, 1906 (34 Stat. L., 80) do hereby prescribe, proclaim, and make known, that all the non-mineral, unallotted and unreserved lands within the diminished Colville Indian Reservation, in the State of Washington, classified as irrigable lands, grazing lands, or arid lands, shall be disposed of under the general provisions of the homestead laws of the United States and of the said Act of Congress, and shall be opened to settlement and entry and settled upon, occupied, and entered only in the manner herein prescribed: *Provided*, That all lands classified as timber or mineral, all lands designated for irrigation by the Government, and all lands within the following townships and parts of townships shall not be disposed of under this proclamation:

Townships 31, 32, 33, and 34 north, range 35 east; township 30 north, range 31 east; township 31 north, range 30 east; north half of township 31 north, range 28 east; townships 32, 33, and 34 north, range 28 east; south half and south half of north half of township 33 north, range 27 east; and fractional part north and east of Lake Omanche of township 32 north, range 27 east.

1. A registration for the lands will be conducted at the cities of Spokane, Wenatchee, Colville, Wilbur, Republic and Omak, Washington, beginning July 5,

and ending July 22, 1916, Sunday excepted, under the supervision of John McPhaul, Superintendent of the opening. Any person qualified to make entry under the general provisions of the homestead law may register.

• • • • •

Act of August 31, 1916, 39 Stat. 672:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, . . . that one section, numbered thirteen, as hereinafter provided, be, and the same hereby is, added to the said Act.

• • • • •

Sec. 13. That the lands allotted, those retained or reserved, and the surplus lands sold, set aside for town-site purposes, or granted to the State or otherwise disposed of, shall be subject to the laws of the United States prohibiting the introduction of intoxicants into the Indian country until otherwise provided by Congress.

Act of July 24, 1956, 70 Stat. 626-627:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the undisposed-of lands of the Colville Indian Reservation, Washington, dealt with by the Act of March 22, 1906 (34 Stat. 80), are hereby restored to tribal ownership to be held in trust by the United States to the same extent as all other tribal lands on the existing reservation, subject to any existing valid rights.

Sec. 2. For the purpose of effecting land consolidations between the Colville Indians and non-Indians in Ferry and Okanogan Counties, the Secretary of the Interior is hereby authorized, with the consent of the tribal council as evidenced by a resolution adopted in accordance with the constitution and bylaws of the tribe, under such regulations as he may prescribe, to sell or exchange tribal lands in connection with the

acquisition of lieu lands, and to acquire through purchase, exchange, or relinquishment, lands or any interest in lands, water rights or surface rights. The acquisition of lands pursuant to this Act shall be limited to lands within the boundary of the reservation. Exchanges of lands, including improvements thereon, shall be made on the basis of approximate equal value. In carrying out the provisions of this Act, if non-Indian lands are involved the board of county commissioners of counties in which land is located shall by proper resolution consent before such non-Indian land is acquired for the tribe or an individual Indian. No lands or interests in lands owned by the Confederated Tribes of the Colville Reservation shall be subject to disposition hereafter without the consent of the duly authorized governing body of the tribes, and no lands or interests in lands shall be acquired for the tribes without the consent of the said governing body.

* * * * *

APPENDIX B

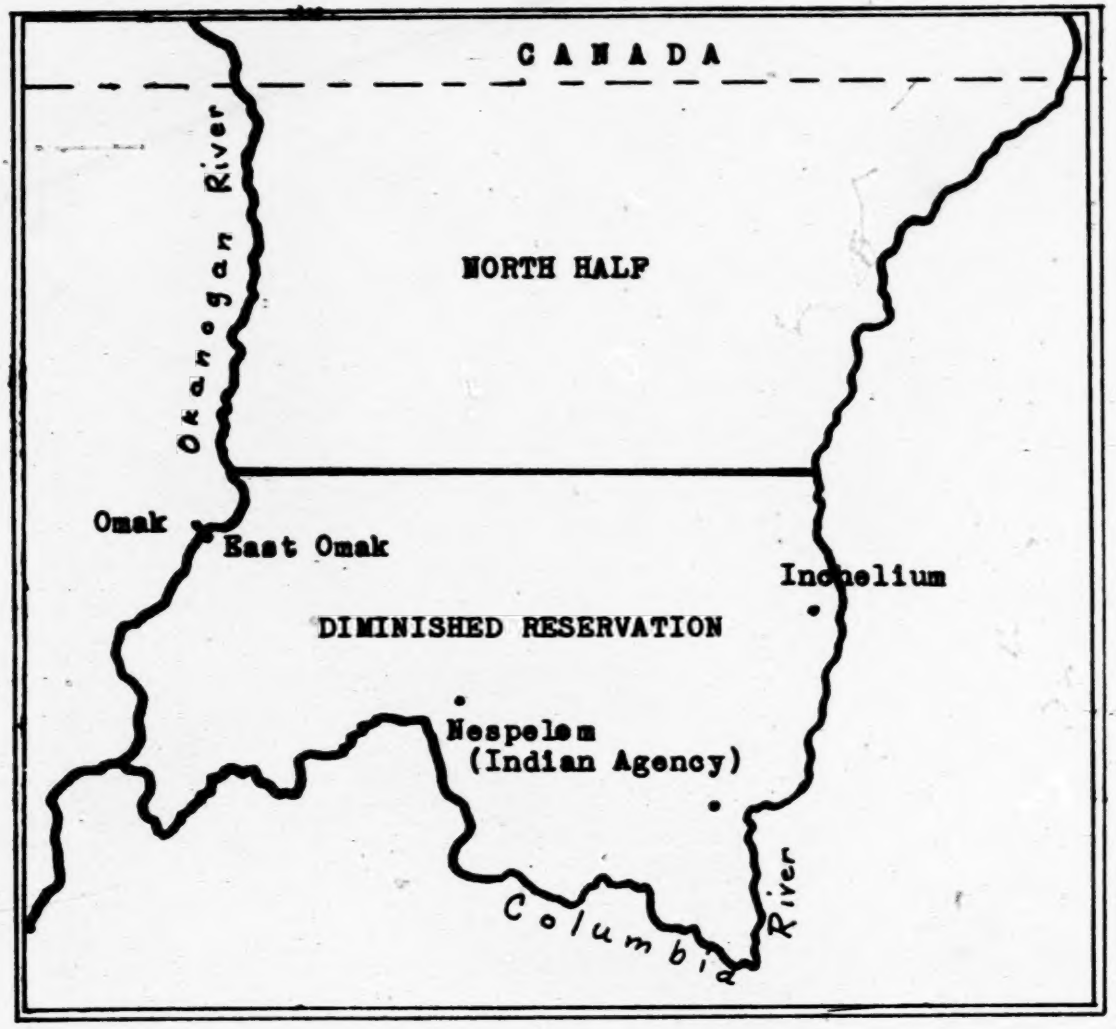
Diagram of Colville Indian Reservation

(See Opposite ☞)

Appendix B

Colville Indian Reservation

Washington



APPENDIX C

Acting Secretary's Memorandum of September 28, 1939:

MEMORANDUM *to the Commissioner of Indian Affairs*:

The attached letter to the Attorney General relating to the applicability of the Indian liquor laws in the town of Mason City, Washington, is returned herewith for further consideration.

Mason City is located on the Columbia River and is occupied by the staff and employees of the Consolidated Builders, Inc., which is engaged under contract with the Bureau of Reclamation in the completion of the Grand Coulee Dam. The land which it occupies was formerly a part of the Colville Indian Reservation but was included in an area designated for sale as surplus unallotted land under the act of March 22, 1906 (34 Stat. 80), as amended by the act of August 31, 1916 (39 Stat. 672). It appears that part of the land was acquired as homestead under a fee patent by William Raths in 1922, while another tract was similarly acquired by Samuel J. Seaton in 1927. Subsequently, in a declaration of taking filed in December 1933 the land was acquired by the United States through condemnation proceedings and has since that time been subject to the jurisdiction of the Bureau of Reclamation in connection with the Grand Coulee Dam construction project.

Construction work on the dam was originally undertaken under a contract with the Mason-Walsh-Atkinson-Kier Company. In pursuance of this contract, the company erected buildings on the land, which included structures for administration of the work and the housing and furnishing of other facilities for the men employed on the dam. Among the latter were a recreation hall containing a restaurant, billiard and pool tables, and other recreational equipment.

The company held a license from the Washington State Liquor Control Board authorizing it to sell light wines and beer in the hall. At the completion of the original contract the construction camp was acquired from the company by the United States and turned over by it to the Consolidated

Builders, Inc., which contracted to complete the work on the dam, and undertook to assume the operation and maintenance of the camp and its facilities. The Consolidated Builders, Inc., has during the past year been in possession of a license from the State of Washington authorizing the sale of light wines and beer at the recreation hall, as in the past. This license expires on September 30, 1939.

It appears that a number of Colville, and perhaps other, Indians are employed in the work on the dam. On the other hand, there appear to be no Indians living on allotments within three miles of the town. Both the original contractor and the Consolidated Builders, Inc., have made it a practice not to sell either light wines or beer to any of their employees identifiable as Indians. The present contractor has undertaken to continue this practice in the future. This is, of course, required by the terms of section 241, title 25, United States Code, prohibiting sales of intoxicating liquors to Indian wards of the Government.

In these circumstances, the proposed letter to the Attorney General takes the position that, upon both administrative and legal grounds, not only the prohibition against sales of liquor to Indians should be in force but the laws making introduction of liquor into Indian country and Indian reservations as well.

The act of August 31, 1916 (39 Stat. 672), provided that the lands included in the surplus area to be disposed of, as well as the lands allotted, retained or reserved within the diminished reservation, were to continue to be subject "to the laws of the United States prohibiting the introduction of intoxicants into the Indian country until otherwise provided by Congress." The lands now occupied by Mason City were undoubtedly within this area and would today be subject to the Indian liquor laws were it not for the fact that the contingency which Congress provided should terminate the application of said laws has occurred in respect to the lands outside the diminished reservation. It was provided by Congress in the act of June 27, 1934 (48 Stat. 1245)

> "That hereafter the special Indian liquor laws shall not apply to former Indian lands now outside of any existing Indian reservation in any case where the land

is no longer held by Indians under trust patents or under any other form of deed or patent which contains restrictions against alienation without the consent of some official of the United States Government: *Provided, however,* That nothing in this Act shall be construed to discontinue or repeal the provisions of the Indian liquor laws which prohibit the sale, gift, barter, exchange, or other disposition of beer, wine, and other liquors to Indians of the classes set forth in the Act of January 30, 1897 (29 Stat. L. 506), and section 241, title 25, of the United States Code."

This act did not, and could not, change the boundaries of any Indian reservation. It did, however, have the effect of freeing from the operation of the liquor laws except as to sales to Indians those lands which were on the date of said act outside the boundaries of existing reservations. The question to be determined, therefore, is whether the land involved was on June 27, 1934, within the boundaries of the Colville Reservation.

In my opinion, the act authorizing the sale of surplus lands of the Colville Reservation had the effect of redefining the boundaries of the reservation so as to exclude therefrom the lands in question which are located on the outer edge of the reservation. These lands were to be sold or disposed of as other public lands under the homestead laws and were in fact so disposed of in 1922 and 1927. The very fact that in the statute authorizing such sale and disposition Congress specifically provided that the Indian liquor laws should nevertheless continue to apply in this area until it should direct otherwise is indication of its belief that its action removed the land from the Federal control exercised over reservation land. If the land was to be regarded as still within the reservation, there was no point in the exception made by Congress in regard to the application of the Indian liquor laws since those laws would continue to apply regardless of any special enactment. Meanwhile, Congress has now manifested its intention that the exception should not prevail as to lands outside existing reservations on June 27, 1934, from the date thereof. Congress has now "otherwise provided" that the Indian liquor laws, except as to sale

to Indians, shall not apply to these lands. I do not believe there is any legal basis for the Department to oppose the issuance of a new license to the Consolidated Builders, Inc., by the Washington State Liquor Control Board upon the expiration of the present license on September 30.

The proposed letter states, and I have been advised by representatives of your office, that such a holding as this will have unfortunate consequences from the point of view of effective enforcement of the Indian liquor laws. It is argued that the question involves not only allowance of the sale of beer and light wines in the Mason City construction camp, where the sale can be regulated by the contractor, and general supervision can be maintained by the Department through the Bureau of Reclamation which has jurisdiction over the land, but also the possibility that other areas which were eliminated from the reservation boundaries as originally defined by operation of the acts authorizing sale and disposition of the surplus lands will be used by other less scrupulous dealers to flood the reservation with liquor. This situation, however, exists in regard to virtually every reservation in the country, both those of which the original boundaries are still intact and those of which the boundaries have been diminished. It is inevitable in view of the fact that the various reservations are surrounded by white-owned areas where liquor is permitted and are in constant contact with the white communities which surround them. Laws which had one meaning when Indian country was a broad territory occupied mainly by Indians must be given new meaning if they are to apply successfully to Indian islands in a white area.

Where, as in the case at hand, the Indian title to a strip of land located on the outer boundaries of an Indian reservation has been extinguished, the act of June 27, 1934, *supra*, must, in my opinion, be applied. The reason for this is that such land can no longer be regarded as a part of the existing reservation. It is located outside, not inside, of the existing reservation. This does not mean, however, that the act is applicable in every case in which the Indian title to a tract of land has been extinguished. A different rule would very properly obtain where non-Indian lands

are entirely surrounded by Indian lands or where the non-Indian tract is located in an area predominantly Indian.

In the situation presented by the proposed letter to the Attorney General there is nothing in a holding that Mason City was on June 27, 1934, outside the boundaries of the Colville Reservation which will interfere with the effective enforcement of the laws prohibiting sales of liquor to Indians. The contractor has undertaken to see that these laws are enforced. There are no Indians living on allotments within a considerable distance of the town. On the other areas referred to in the letter, however, it might well be that to hold them to be outside the reservation boundaries would be to open up the entire reservation to intoxicating liquor. In such circumstances, a different ruling might well be made. In each case, a ruling by the Department will be necessary to determine whether the facts warrant a holding that a particular tract of land is within or without reservation boundaries. These cases, however, can and should await decision when they arise.

/s/ E. K. Burlew
Acting Secretary of the Interior

APPENDIX D

Acting Solicitor's Memorandum of August 7, 1941:

MEMORANDUM *for the Commissioner of Indian Affairs*:

A question of the proper interpretation of the act of June 27, 1934 (48 Stat. 1245), modifying the operation of the Indian liquor laws on former Indian lands, and its application to the Yankton Indian Reservation was raised by the attached letter to the superintendent of the Rosebud Agency. The purport of that letter was to authorize Dr. Duggan, under the authority of the 1934 act, to introduce liquor into the town of Wagner within the original boundaries of the Yankton Reservation without regard to the Indian liquor laws. Because of the importance of this ruling in determining the proper application of the 1934 act to the Yankton and similar reservations, the letter to the superintendent was held for an opportunity for full consideration, with the understanding that there was no immediate necessity for acting upon the particular case discussed in the letter.

The question is whether the former Indian lands within the boundaries of the Yankton Indian Reservation, as it existed at the time of the agreement between the United States and the Yankton Sioux Indians of December 31, 1892, ratified in 1894 (28 Stat. 314), are relieved from the prohibitions of the Indian liquor laws by the 1934 act. The agreement of 1892 ceded to the United States the surplus unallotted lands within the Yankton Reservation, as created by the treaty of April 19, 1858 (11 Stat. 1143). Article XVII of the agreement contained the following prohibition on the sale of liquor on any class of lands within the reservation:

> "No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded or sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the

> United States, dated April 19th, 1858, and as afterwards surveyed and set off to the said Indians * * * ."

The authority of Congress to make such a prohibition and its continuing application to the surplus ceded lands of the reservation were upheld in the case of *Perrin* v. *United States*, 232 U.S. 478 (1914), and no further question as to the application of the liquor laws to the Yankton Reservation arose until the passage of the 1934 act.

The precise wording of the 1934 act is important. It provides:

> "The special Indian liquor laws shall not apply to former Indian lands now outside of any existing Indian reservation in any case where the land is no longer held by Indians under trust patents or under any other form of deed or patent which contains restrictions against alienation without the consent of some official of the United States Government: *Provided, however*, That nothing in this section shall be construed to discontinue or repeal the provisions of the Indian liquor laws which prohibit the sale, gift, barter, exchange, or other disposition of beer, wine, and other liquors to Indians of the classes set forth in the Act of January 30, 1897 (29 Stat. L. 506), and section 241 of this title."

In order, therefore, to affirm that the town of Wagner is no longer covered by the liquor laws, it is necessary to hold that the town and other ceded lands are outside an existing Indian reservation. The letter to the superintendent makes this holding in the final paragraph, which reads as follows:

> "In view of all the circumstances we believe that a liberal view of the said Act of June 27, 1934 would justify our ruling that said Act modified the provisions of said Art. XVII of the Agreement of December 31, 1892 so as to release the fee-patented lands of said area from the necessity of obtaining an Indian country permit for the introduction and possession of liquor therein, and that this ruling will be considered as extending to fee-patented lands outside the specific agency

or school reserves even though entirely surrounded by trust allotments, or trust allotments together with one or more of said reserves. We therefore so rule and accordingly modify the view expressed in our letter of March 1, 1937."

The circumstances which influenced the Indian Office decision are the large amount of reservation land which has been fee patented and the existence of towns within the reservation. These circumstances may be persuasive in reaching an administrative conclusion, but I cannot agree with the conclusion as a matter of law.

The agreement of 1892 provided for the sale of such lands within the reservation as were not allotted or used for designated purposes. It did not provide for the sale of a particular designated part of the reservation. The act should be distinguished from other cession acts which ceded a definite part of the reservation and treated the remaining area as a diminished reservation. The lands allotted on the Yankton Reservation were scattered over all the reservation, as may be seen from the attached map, prepared in 1933 or 1934, showing these allotments still restricted. Since the 1892 agreement there has been no redefinition by Congress of the Yankton Reservation nor determination that the reservation no longer exists. On the contrary, the reservation was referred to as a still existing unit in the acts of April 29, 1920 (41 Stat. 1468), and June 11, 1932 (47 Stat. 300)..

In the case of allotted reservations it is, of course, a common fact that lands within the boundaries are unrestricted in greater or lesser quantity. Where a large quantity becomes unrestricted, reason may exist for changing the boundaries of the reservation under congressional authority. Without congressional sanction, I know of no administrative authority to decide at what time and to what extent a reservation shall be considered reduced.

The legislative history and purpose of the 1934 act show that the term "outside of any existing Indian reservation" intended to mean outside of the exterior boundaries of any existing Indian reservation and did not mean outside of any remaining restricted lands within a reservation. As

the bill was originally introduced it contained the additional proviso that "all land within the exterior boundaries of an existing or subsequently established Indian reservation shall be subject to all Indian liquor laws now existing or hereafter provided by Congress." The omission of this clause indicates an intent not to change the status of the liquor laws within the boundaries of reservations. But the contrast between lands outside of the reservation and those within the boundaries of the reservation remains apparent from the body of the act.

In its report to Congress on the bill, the Department listed the Yankton Reservation with 13 other reservations as instances where Congress had provided for the continuation of the Indian liquor laws on former Indian lands. No distinction is made in this list between the reservations where a designated part was ceded and removed from the reservation, as in the case of the Rosebud, Pine Ridge, Standing Rock, and Cheyenne River Reservations, and those reservations where the ceded lands were scattered among the allotted lands and the reservation boundaries not changed, as at Fort Peck and Omaha. The listing must be considered informative and not determinative, particularly since the Department recommended that "all lands within the exterior borders of the present or subsequently established Indian reservations should be subject to the Indian liquor laws."

Amendatory legislation will be necessary if your office determines that the Indian liquor laws should not apply to former Indian lands within the boundaries of a reservation where such lands predominate over the remaining Indian lands.

/s/ FELIX S. COHEN
Acting Solicitor

APPENDIX E

Pertinent provisions of the Acts of December 21, 1904, 33 Stat. 595 (Yakima) and March 22, 1906, 34 Stat. 80-82 (Colville), as amended by the Acts of May 6, 1910, 36 Stat. 348-349 and August 31, 1916, 39 Stat. 672, are shown in parallel columns for easy comparison:

Yakima (1904)	Colville (1906)
... That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of unallotted lands embraced in the Yakima Indian Reservation proper, in the State of Washington, ...	... That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of unallotted lands in the diminished Colville Indian Reservation, in the State of Washington.
• • • • •	• • • • •
Sec. 3. That the residue of the lands of said reservation —that is, the lands not allotted and not reserved— shall be classified under the direction of the Secretary of the Interior as irrigable lands, grazing lands, timber lands, mineral lands, or arid lands, and shall be appraised under their appropriate classes by legal subdivisions, ...	Sec. 3. That upon the completion of said allotments to said Indians the residue or surplus lands—that is, lands not allotted or reserved for Indian school, agency, or other purposes—of the said diminished Colville Indian Reservation shall be classified under the direction of the Secretary of the Interior as irrigable lands, grazing lands, timber lands, mineral lands, or arid lands, and shall be appraised under their appropriate classes by legal subdivisions, ...
• • • • •	• • • • •
Sec. 4. That the proceeds arising from the sale and dis-	Sec. 6. That the proceeds not including fees and com-

position of the lands aforesaid, including the sums paid for mineral lands, exclusive of the customary fees and commissions, shall, after deducting the expenses incurred from time to time in connection with the appraisements and sales, be deposited in the Treasury of the United States to the credit of the Indians belonging and having tribal rights on the Yakima Reservation, ...

* * * * *

Sec. 6. That the Secretary of the Interior is hereby vested with full power and authority to make all needful rules and regulations as to manner of sale, notice of same, and other matters incident to the carrying out of the provisions of this Act, and with authority to reappraise and reclassify said lands if deemed necessary from time to time, and to continue making sales of the same, in accordance with the provisions of this Act, until all of the lands shall have been disposed of.

missions arising from the sale and disposition of the lands aforesaid, including the sums paid for mineral and town-site lands shall be, after deducting the expenses incurred from time to time in connection with the allotment, appraisement, and sales, and surveys, herein provided, deposited in the Treasury of the United States to the credit of the Colville and confederated tribes of Indians, belonging and having tribal rights on the Colville Indian Reservation, in the State of Washington, and shall be expended for their benefit, ...

* * * * *

Sec. 8. That the Secretary of the Interior is hereby vested with full power and authority to make all needful rules and regulations as to the manner of sale, notice of same, and other matters incident to the carrying out of the provisions of this Act, and with authority to reappraise and reclassify said lands if deemed necessary from time to time, and to continue making sales of the same, in accordance with the provisions of this Act, until all of the lands shall have been disposed of.

Sec. 7. That nothing in this Act contained shall be construed to bind the United States to find purchasers for any of said lands, it being the purpose of this Act merely to have the United States to act as trustee for said Indians in the disposition and sales of said lands and to expend or pay over to them the proceeds derived from the sales as herein provided.

• • • • •

1910 Amendment

. . . That the Act approved December twenty-first, nineteen hundred and four, entitled "An Act to authorize the sale and disposition of surplus or unallotted lands of the Yakima Indian Reservation in the State of Washington," be, and the same is hereby, amended by adding thereto the following:

• • • • •

"Sec. 11. That the lands allotted, those retained or reserved, and the surplus lands sold or otherwise disposed of shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country."

Sec. 9. That nothing in this Act contained shall be construed to bind the United States to find purchasers for any of said lands, it being the purpose of this Act merely to have the United States to act as trustee for said Indians in the disposition and sales of said lands and to expend or pay over to them the net proceeds derived from the sales as herein provided.

• • • • •

1916 Amendment

. . . That section seven of the Act of March twenty-second, nineteen hundred and six (Thirty-fourth Statutes at Large, page eighty), entitled "An Act to authorize the sale and disposition of surplus unallotted lands of the diminished Colville Indian Reservation, in the State of Washington, and for other purposes," be, and the same is hereby, amended . . . and that one section, numbered thirteen, as hereinafter provided, be, and the same hereby is, added to the said Act.

• • • • •

"Sec. 13. That the lands allotted, those retained or reserved, and the surplus lands sold, set aside for town-

site purposes, or granted to the State or otherwise disposed of, shall be subject to the laws of the United States prohibiting the introduction of intoxicants into the Indian country until otherwise provided by Congress."

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1961

No. 62

PAUL SEYMOUR, *Petitioner,*

v.

SUPERINTENDENT OF THE WASHINGTON STATE PENITENTIARY, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE RESPONDENT

JOHN J. O'CONNELL,
Attorney General of the State of Washington,

STEPHEN C. WAY,
Assistant Attorney General,

Counsel for Respondent.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1961

No. 62

PAUL SEYMOUR, *Petitioner,*

v.

SUPERINTENDENT OF THE WASHINGTON STATE PENITENTIARY, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE RESPONDENT

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TO: THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

ADDITIONAL STATEMENT OF THE CASE

The respondent, except as hereafter noted, is satisfied with the statement of the case as set forth in the brief of counsel for petitioner.

Counsel for petitioner has, in general terms, on page 4 of his brief, described the "*situs*" of the crime committed by the petitioner, however, he omits the legal description of the land in question. It is the respondent's position that the legal description of the land in question should also be included in the statement of the case for it clearly indicates that the land in question, *inter alia*, was part of the "Government Town-site of Omak", (R 14, 16).

Accordingly, in addition to the statement of the case set forth in petitioner's brief, the respondent respectfully submits that the legal description of the "*situs*" of the crime in question should be considered as a part of the factual statement of the case. The legal description of the land in question is as follows:

> "Lot 9, block 118 of the Government Town-site of Omak and situate in Section 36, Township 34, north range 26 E. W. M." (R 16).

SUMMARY OF ARGUMENT

As said by the Supreme Court of the State of Washington (R 26) in the case at bar,

> "The crime not having been committed in "Indian Country" as defined by Statute (18 U. S. C., (1952 ed.) Sec. 1151), the courts of the United States did not have exclusive jurisdiction."

The basis for this decision is derived from the definition of "Indian Country" contained in Sec. 1151, Tit. 18 U. S. C., which means "all land within the limits of any Indian reservation under the

jurisdiction of the United States Government". This definition, upon which depends whether or not jurisdiction in this case is vested in a federal or a state court, coupled with the language chosen by Congress in the *Act of March 22, 1906* (Appendix page 44) "opening" the diminished Colville Indian Reservation to settlement by non-Indians, and the results which Congress must have anticipated, leads to the conclusion that Congress intended to diminish, if not dissolve the reservation, subject to reservations and allotments in severalty to the Indians.

An Indian Reservation cannot, in the nature of things, be closed and reserved for the use and occupancy of Indians, and, at the same time "opened" to settlement and entry by non-Indians.

Congress, in the *Act of March 22, 1906*, (Appendix page 44) projected an extensive plan for the diminished Colville Indian Reservation, and in fact, the Act takes some dispositive action of every piece of ground within the "limits" of the reservation. The Act provides allotments of 80 acres to each Indian of the Colville Tribes, it provides for reserving lands for numerous Indian and Agency purposes, it provides for the making of reservations for townsites for the "future public interests" and subject to the allotments and reservations "opened" the Colville Reservation to entry and settlement under the general Mining and Homestead Laws.

The federal Indian policy in vogue when the *Act of Congress of March 22, 1906* was enacted, was

one of gradual withdrawal and opening of Indian reservations, granting allotments, and the assimilation of the Indian into the white man's world. (Cohen, Hand Book of Federal Indian Law (1942) Chapter 11, pp. 206-217).

Notwithstanding what the Federal Indian Policy was in those days, it is manifest from the provisions of the *Act of Congress of March 22, 1906*, (Appendix page 44) that Congress, by its extensive treatment of the lands of the diminished Colville Indian Reservation intended to diminish, if not dissolve the reservation, subject to the reservations and allotments in severalty to the individual enrolled members of the Colville Confederated Tribes. Additionally, this dimunition or dissolution of the diminished Colville Indian Reservation was not undone, or substantially changed by the *Act of Congress of July 24, 1956*, 70 Stat. 626, restoring lands undisposed of under the *Act of March 22, 1906* (Appendix 44) "to tribal ownership to be held in trust by the United States to the same extent as all other tribal lands on the existing reservation, subject to any existing valid rights."

In any event, the crime involved was not committed in "Indian Country" and not "within the limits of any Indian reservation under the jurisdiction of the United States Government", for the reason that the criminal act was committed upon the Government Town-site of Omak, a reservation created under the authority of Section 11 of the *Act of Congress of March 22, 1906* (Appendix 49)

for the "future public interests." (A certified copy of the Plat of the Government Town-site of Omak filed with the auditor of Okanogan County marked respondent's exhibit 1, and a certified copy of the original patent to Lot 9, block 118 of the Government Town-site of Omak where the crime in question was committed, marked respondent's exhibit 2 are transmitted herewith to the clerk for filing).

As was succinctly stated relative to this facet of the case in *United States v. La Plant*, (D. C.,) 200 Fed. 92, 95:

> "* * * The indictment alleges that the Secretary of Interior had designated a part of Sec. 31 on the land thus opened for sale as the Town-site of Dupree, had caused it to be surveyed into blocks and lots, and that the offense was committed on one of the lots in that town-site. It thus appears that the Secretary of the Interior had reserved this land for a town-site. If, at the same time, it is to be considered a part of an Indian reservation, it has been reserved for two purposes. When the town-site map was filed, the streets and public places must have been dedicated to the public. Congress could never have intended that the Indian right of occupation as to those streets and public places should continue. It must be that, if the offense had been committed upon the street of this town-site, it would have been within the jurisdiction of the state courts. * * *"

Accordingly, it is the additional contention of the respondent, that the "Government Town-site of Omak", within which the crime involved was committed (R 14, R 16, Exhibits 1 and 2) became

subject to the exercise of criminal jurisdiction by the courts of the State of Washington upon the filing of the Town-site Plat with the County Auditor of Okanogan County. When so filed, the lands encompassed within the town-site were dedicated to the public interests, and those lands acquired the same status that other lands possess, which are subject to the exercise of criminal jurisdiction by the courts of the State of Washington.

ARGUMENT

THE "SITUS" OF THE CRIME OF WHICH THE PETITIONER WAS CONVICTED IS NOT "INDIAN COUNTRY".

The diminished Colville Indian Reservation, is located in the north east part of the State of Washington in the Counties of Okanogan and Ferry and was originally established in accordance with an Executive Order of President Grant under the date of July 2, 1872 which provides:

> "EXECUTIVE MANSION,
> *Washington, July 2, 1872.*
>
> "It is hereby ordered that the tract of country referred to in the within letter of the Commissioner of Indian Affairs as having been set apart for the Indians therein named by executive order of April 9, 1872, be restored to the public domain, and that in lieu thereof the country bounded on the east and south by the Columbia River, on the west by the Okanogan River, and on the north by the British possession, be, and the same is hereby, set apart as a reservation for said Indians, and such other

> Indians as the Department of Interior may see fit to locate thereon.
>
> "U. S. GRANT." (R 17).

The Colville Indian Reservation in the State of Washington was first diminished in accordance with the *Act of Congress approved July 1, 1892* (27 Stat. 62) and the *Presidential Proclamation of April 10, 1900, (Vol. I, Kappler, Indian Affairs, Laws and Treaties, page 966)* which restored approximately the north one-half of the reservation to the public domain, subject to allotments of eighty (80) acres to each individual Indian residing on the restored portion. The balance of the restored portion of the reservation with certain exceptions, was opened to entry and settlement under the Homestead Laws in accordance with the *Presidential Proclamation of April 10, 1900, supra.*

Section 8. of the *Act of Congress of July 1, 1892,* (27 Stat. 62) (R 18) specifically provided that the Act was not to be

> "construed as recognizing title or ownership of said Indians to any part of said Colville Reservation, whether that hereby restored to the Public Domain *or that reserved by the Government for their use and occupancy.*"

The remaining portion of the reservation which was reserved for the use and occupancy of the Confederated Tribes of the Colville Reservation is commonly known as the "south half of the diminished Colville Reservation."

The "*situs*" of the crime of which the petitioner was convicted, i.e.,

> "Lot 9, block 118 of the Government Town-site of Omak and situate in Section 36, Township 34, north range 26 E. W. M." (R 16),

is within the so-called south half of the diminished Colville Indian Reservation.

In the year 1906, Congress opened to entry and settlement under the Homestead Laws, the so-called south half of the diminished Colville Indian Reservation, and directed the Secretary of the Department of Interior to sell and dispose of the surplus, unallotted and unreserved lands of the diminished Colville Indian Reservation of the State of Washington in accordance with the *Act of Congress of March 22, 1906*, 34 Stat. 80, (Appendix 44) and the *Presidential Proclamation of May 3, 1916*, (IV Kappler, *Indian Affairs, Laws and Treaties*, page 966).

The Supreme Court of the State of Washington decided, in the case at bar, that the crime of which the petitioner was convicted was not committed in "Indian Country" as defined by Statute (Section 1151, Tit. 18, U. S. C.). In so deciding, the Supreme Court of the State of Washington adopted the finding of the Honorable Joseph Wicks, Judge of the Superior Court for Okanogan County where the matter had been referred for findings of fact. (R 14) The court also reaffirmed its previous decision in *State ex. rel. Best v. Superior Court*, 107 Wash. 238, 181 Pac. 688, that the *Act of Congress of March 22, 1906* had the effect of restoring to the public domain, the south half of the diminished Colville Indian Reser-

vation, subject to the reservations and allotments in severalty to individual Indians.

Section 1151, Tit. 18, U. S. C., defines, "Indian Country" as follows:

> "Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) *all land within the limits of any Indian reservation under the jurisdiction of the United States government*, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

Did the *Act of Congress of March 22, 1906* and the *Presidential Proclamation of May 3, 1916* implementing the *Act of Congress*, remove the land upon which the crime in the instant case was committed, from "within the limits of any Indian Reservation under the jurisdiction of the United States Government" as provided in Section 1151, Tit. 18 U. S. C., and as a result vest the state court with jurisdiction?

There are a number of reported cases substantially similar to the case at bar and supportive of the decision of the Supreme Court of the State of Washington in the instant case. One of these cases is *Tooisgah v. United States*, (10th Circ.) 186. Fed. (2d) 93, 96. In that case, the petitioner, a full

blooded Apache Indian had been convicted of the murder of another Indian in the United States District Court for the Western District of Oklahoma. The indictment alleged that the homicide had occurred on June 2, 1942, in Caddo County, in the Western District of Oklahoma in "Indian Country" upon a reservation within the exclusive jurisdiction of the United States. In addition, the homicide, apparently, was committed on a restricted allotment to which the United States held legal title.

The petitioner filed his motion in the District Court, praying that the judgment of conviction be vacated on the basis that the trial court was without jurisdiction. The District Court denied the motion and, on appeal, the Circuit Court of Appeals for the 10th Circuit held, that the District Court did not have jurisdiction of the prosecution, and, that the conviction should be vacated and the indictment dismissed.

The court, in the course of its opinion in *Tooisgah v. United States, supra*, stated:

> "* * * the only question for decision is whether the asserted federal jurisdiction over the offense is sustainable under 328 (since amended and now § 1153 Tit. 18 U. S. C.) as an offense of murder of one Indian by another, 'on and within any Indian Reservation under the jurisdiction of the United States Government.'
>
> "* * *
>
> "Undoubtedly, the alleged crime was committed on lands originally 'on and within any

Indian Reservation', set apart and established by the Medicine Lodge Treaty of 1867 between the United States and the Kiowa, Comanche and Apache Indians, 15 Stat. 581, 589. See *Lone Wolf v. Hitchcock*, 187 U. S. 553, 554, 23 S. Ct. 216, 47 L. Ed. 299.

"Subsequently, by agreement dated October 6, 1892, approved June 6, 1900, 31 Stat. 676, the Kiowa, Comanche and Apache Indians occupying the reservation agreed with the United States that subject to the allotments of land in severalty to the individual members of the tribes; the setting aside of 480,000 acres of grazing lands, and other considerations, the tribes ceded, conveyed, transferred, relinquished and surrendered forever and absolutely all their claim, title and interest of every kind and character in and to the lands embraced in the reservation. Out of the lands thus ceded, and in part consideration thereof, it was agreed that each member of the respective tribes should have the right to an allotment of 160 acres of land, to be held and owned in severalty. The agreement also provided that when the allotments of land had become selected and approved by the Secretary of the Interior, the titles thereto should be held in trust for the allottees respectively for a period of twenty five years in the time and manner and to the extent provided for in the General Allotment Act of February 8, 1887, 24 Stat. 388.

"Section 6 of the General Allotment Act, as amended by the Act of May 8, 1906, 34 Stat. 182, provided that at the expiration of the trust period, and when the lands had been conveyed to the Indian allottees in fee, every allottee 'shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside', provided that 'until the issuance of fee simple patents

all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: And provided further, That the provisions of this Act shall not extend to any Indians in the Indian Territory.' See *Ex parte Nowabbi*, 60 Okl. Cr. 111, 61 P. (2d) 1139. It is not alleged that either Indian involved here, occupied the status of an allottee of lands, the title to which is held in trust by the United States, and federal jurisdiction is not invoked or sought to be sustained under the provisions of this Act.

"The allotment of lands in severalty within the limits of the established reservation did not for that reason disestablish the reservation of which they were a part, or exclude the allotments from it. *United States v. Kiya*, D. C., 126 F. 879. Once the reservation is established 'all tracts included within it remain a part of the reservation until separated therefrom by Congress.' *United States v. Celestine*, 215 U. S. 278, 285, 30 S. Ct. 93, 95, 54 L. Ed. 195; Cf. *Kills Plenty v. United States*, 8 Cir., 133, F. (2d) 292; *United States v. Frank Black Spotted Horse*, D. C., 282 F. 349; *Hatten v. Hudspeth*, 10 Cir., 99 F. (2d) 501.

"When, however, the tribes occupying the reservation ceded the lands embraced within it to the United States, relinquishing and surrendering 'all their claim, title and interest,' subject to the allotments in severalty, and every allottee was given the benefit of and made subject to the laws, both criminal and civil, of the state or territory, with the gift of citizenship and equal protection of the laws, Section 6 of the Act of February 8, 1887, 24 Stat. 388, we think it cannot be doubted that Congress thereby intended to dissolve the tribal government, disestablish the organized reservation, and assimilate the Indian Tribes as citizens

of the state or territory. *United States v. LaPlant*, D. C., 200 F. 92."

"• • •

"We find it unnecessary to decide whether the trust allotments in question might have been construed as 'Indian Country' under 217 or 548 when the offense was committed, since we are convinced that Congress did not intend to use the terms 'Indian Country' and 'within the limits of any • • • reservation' synonymously when it came to relax the limitations imposed upon 217 by 218. When the legislative scheme is considered in its historical setting, we think it of controlling significance that instead of employing the familiar term 'Indian Country', with its broad and flexible definition to delineate federal jurisdiction, Congress chose language carefully designed to recognize the sovereign jurisdiction of the state, unless the offense was committed on a place set apart for the government of the Indians as a tribe. The deliberate choice of the phrase 'within any Indian Reservation under the jurisdiction of the United States government' indicates, we think, a Congressional disposition to restrict federal jurisdiction to organized reservations lying within a state.

"In the reenactment of 548 as Section 1153, Title 18 U. S. C. A., Congress substituted 'Indian Country' for 'on (or) within any Indian Reservation', thus conferring federal jurisdiction over the enumerated tribes when committed in Indian Country, as defined in Section 1151 of the revised Criminal Code.

"But, judging federal jurisdiction here under the words of the statute when the offense was committed, we are now constrained to hold that when the reservation was dissolved and tribal government broken up, the allotted lands

> lost their character as lands 'within any Indian Reservation'. Nor did they retain or acquire a character and identity peculiar to a separate Indian Reservation. We, therefore, hold that the court lacked jurisdiction over the offense. The order is, accordingly, reversed and the cause remanded with directions to vacate the judgment and dismiss the indictment."

The Act of Congress, upon which the court in *Tooisgah v. United States, supra*, grounded its decision, which was the agreement with the Kiowa, Comanche and Apache Indians, dated October 6, 1892 and approved by Congress June 6, 1900, 31 Stat. 676, had substantially the same effect upon that group of Indians and their reservations, as did the *Act of Congress of March 22, 1906*, 34 Stat. 80, upon the south half of the diminished Colville Indian Reservation.

The Act of Congress involved in *Tooisgah v. United States, supra*, provided for allotments of 160 acres to individual members of the tribes out of the lands ceded, the reserving of 480,000 acres of land for grazing purposes, and reserving out of the lands ceded, lands "used or occupied for military, agency, school, school-farm, religious or other public uses or in Sections 16 and 36 in each Congressional Township" and the balance of the lands ceded by the tribes were opened to settlement and entry under the Homestead Laws and Townsite Laws by Proclamation of the President.

The *Act of Congress of March 22, 1906*, affecting the diminished Colville Reservation, provided

for allotments to individual members of the Colville Indian Tribes of 80 acres to each individual member and, on approval of the allotments by the Secretary of Interior, patents were issued therefor, under the provisions of the General Allotment Law of the United States. The Act further, reserved lands necessary for agency, school, and religious purposes, and any lands now occupied by the agency building and the site of any saw mill, grist mill or other mill property on the land. The *Act of Congress of March 22, 1906* also authorized the Secretary of Interior to reserve from the lands, "whether surveyed or unsurveyed, such tracts for town-site purposes, as, in his opinion, may be required for the future public interests" and the balance of the lands were opened to settlement and entry under the general Homestead Laws of the United States.

The only difference between the Act involved in *Tooisgah v. United States, supra*, and the *Act of Congress of March 22, 1906, supra*, involved in the case at bar, is that in the Act involved in *Tooisgah*, the lands were ceded by the Indians to the United States, in consideration of the payment to the Indians of two million dollars. The cession of the lands, however, in the *Tooisgah case, supra*, was necessary in order that the United States might make good title to the lands opened to settlement and entry under the Homestead Laws, for the lands in the *Tooisgah* case were held by those tribes pursuant to the treaty entered into between the Indians and the United States which is known as the *Medicine Lodge*

Treaty of 1867, 15 Stat. 581. Of course, in the *Act of Congress of March 22, 1906*, there was no necessity for a cession of the lands by the Colville Indians for they were never the fee owners of the lands, the reservation having been created by Executive Order. Section 8 of the *Act of Congress of July 1, 1892*, 27 Stat. 62 makes it abundantly clear that title to the Colville Reservation is vested in the United States, for it provides:

> "That nothing herein contained shall be construed as recognizing title or ownership of said Indians to any part of said Colville Reservation, whether that hereby restored to the public domain *or that reserved by the Government for their use and occupancy.*" (Emphasis supplied)

It would, indeed, be inconsistent and inappropriate to say that, an Indian Reservation, (an Indian Reservation being commonly known to be an area of land reserved from public sale and appropriation, and dedicated to the use and occupancy of tribal Indians) remains an Indian Reservation, when its closed or reserved Indian character is extinguished by Act of Congress, opening such land to the entry, settlement and ownership by non-Indians.

It is further to be observed that the Act is a total, comprehensive and apparently intended to be a final treatment of the diminished Colville Reservation, and manifestly, Congress intended, by its extensive treatment concerning the lands within the reservation, to dissolve the so-called diminished Col-

ville Reservation and restore the same to the public domain.

In the case of *The Application of De Marrias*, 77 S. D. 294, 91 N. W. (2d) 480, the Supreme Court of South Dakota held that the opening of the Lake Traverse Indian Reservation in South Dakota, pursuant to an agreement with the Indians of that reservation, opening the reservation to entry and settlement under the *Homestead Laws of the United States*, (26 Stat. 1035), removed the *situs* of the crime, there involved, which was within the original exterior boundaries of the Lake Traverse Indian Reservation, from the definition of "Indian Country", as defined in Section 1151 of Tit. 18, U. S. C.

In the *De Marrias case, supra*, there is found in the course of the opinion, a citation to a very interesting Law Review article, authored by Mr. Clinton G. Richards, United States Attorney for the District of South Dakota which article is found in Volume 2 of the *South Dakota Law Review* on page 48. Commencing on page 50 of Volume 2 of the *South Dakota Law Review* under the caption, "What Is 'Indian Country' ", the author states:

> "In the 1948 Revision this term is defined and appears as Section 1151 of Title 18, U. S. C. A. (62 Stat. 757, amended 63 Stat. 94 (1949)). Three different kinds of property are there declared to be 'Indian Country.' Under subdivision (a) of the section covering 'land within the limits of any Indian reservation,' some question has been raised as to just what are the 'limits' of the Indian reservations in South Dakota. It would appear, however, that those

portions of the Pine Ridge, Rosebud, Lower Brule and Crow Creek Reservations which have never been opened to white settlement by any act of Congress or presidential proclamation, and known as the 'closed' portion of such reservations are clearly within such 'limits,' and that the federal court has jurisdiction over any violation of the laws of the United States involving an Indian, whether the acts are committed upon patented or unpatented land within such limits. However, in those areas which are included within the original territorial limits of the Indian reservations but which have been opened to white settlement from time to time, and which at this time practically include all of the Cheyenne, Standing Rock, Sisseton and Yankton Sioux Reservations, the 'limits' of such reservations are confined to the portions thereof for which the United States still retains title, such as, for example, the agency, school and hospital grounds, and together with all the remaining Indian allotments wherever located on such reservation held in trust for the allotment Indians. This rule has quite recently been applied by the United States District Court in a civil case affecting that part of the Pine Ridge Indian Reservation which is within the County of Bennett, (*United States v. Putnam and Ward*, Civil No. 586, W. D. Sioux Falls, S. D.) and by the Circuit Court of South Dakota, Second Judicial Circuit, in a criminal case where the act was committed in the town of McLaughlin, within the Standing Rock Reservation. (*In re Culbertson*, S. D. Circuit Court, (2d) Circuit, Minnehaha County, March 20, 1956.) This rule was in effect applied by the United States District Court in an earlier case sustaining federal court jurisdiction where the crime had been committed on an allotment in Stanley County, South Dakota, within the exterior boundaries of the former Great Sioux

Reservation, but not within the 'boundaries' of any of the lesser reservations later created by Congress. (*Ex Parte Van Moore*, 221 Fed. 954 (D. S. D. 1915).) Of course, where the crime was committed outside the 'closed' portion of the reservation, even though within the original territorial limits of the reservation, but on patented ground to which the Indian title has been extinguished, it is held that the state court does have, (*State v. Sauter*, 48 S. D. 409, 205 N. W. 25 (1925).) and that the federal court does not have, (*United States v. La Plant*, 200 Fed. 92 (D. S. D. 1911).) jurisdiction. The courts of Montana have adopted a different rule, holding that the federal court (*Guith v. United States*, 230 F. (2d) 481 (9th Cir. 1956).) does have jurisdiction, but that the state court does not, (*State ex rel. Irvine v. District Court*, 125 Mont. 398, 239 P. (2d) 272 (1951).) even though the crime be not one of the Ten Major Crimes. (*State ex rel. Bokas v. District Court*, 108 Mont. 37, 270 P. (2d) 396 (1954).)."

In *State v. Sauter*, 48 S. D. 409, 205 N. W. 25, 28, the Supreme Court of South Dakota decided that the offense involved, which was committed on an unpatented Homestead claim situated within the original boundaries of the Cheyenne Indian Reservation, was no longer, "within the limits of any Indian Reservation in the State of South Dakota".

The State of South Dakota, through its State Legislature, ceded to the United States Government by the Enactment of Chapter 106, Laws of 1901, jurisdiction of certain crimes committed on Indian Reservations in the State of South Dakota. The United States assumed the criminal jurisdiction tendered by the State of South Dakota by the *Act of Congress*

of February 2, 1903 (32 Stat. 793), which prescribed that the jurisdiction of the Federal Courts would extend to certain crimes, "*within the limits of any Indian Reservation* in the State of South Dakota". (Emphasis supplied)

The Supreme Court of South Dakota, in deciding that the "limits" of the Cheyenne Indian Reservation have been changed stated:

> "This law was enacted in 1903, and no doubt would govern this case had the reservation remained the same as it was then, but in 1908, a law (Chapter 218, 35 St. At Large, 460) was enacted changing the boundary of the Cheyenne Indian Reservation whereby the territory in which this offense was committed was excluded from the reservation. This brings the case clearly within what is said in *United States v. La Plant* (D. C.), 200 Fed. 92, and for the reasons stated in that case, we hold that the state courts have jurisdiction of this case * * *"

A review of the *Act of Congress of May 29, 1908* (35 Stat. 460) which formed the basis for the decision in *State v. Sauter, supra*, is not substantially different than the *Act of Congress of March 22, 1906* (34 Stat. 80) (Appendix 44) affecting the Colville Indian Reservation, and in their ultimate reach, the Acts have the same effect, viz., extinguishing the closed or reserved character of the lands of these reservations opened to settlement by non-Indians.

The difference between the Acts of Congress affecting the Colville Indian Reservation and the Act of Congress affecting the Cheyenne Indian Res-

ervation, at issue in *State v. Sauter, supra*, is noted in *U. S. v. La Plant*, (D. C.) 200 Fed. 92 wherein the court states:

> "* * * The question, therefore, is whether or not on the 20th day of March, 1911, when this offense was committed, the place where it was committed was within an Indian reservation. That place, according to the indictment, was included in the land open to settlement by Act of May 29, 1908, c. 218, 35 Statutes at Large, 460. It is claimed by the United States Attorney that that act did not diminish the reservation, so as to exclude the land therein referred to. In section 2 of the act, however, is found the following proviso:
>
> > "Provided, That prior to the said proclamation, the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the area described in Section 1 of this act, to relinquish such allotment and to receive in lieu thereof an allotment anywhere within the respective reservations *thus diminished*, to which reservations the said Indians may belong."
>
> "No other meaning can be given to the words italicized than that the reservations were diminished, and they were diminished by the act itself. The word, "thus", so indicates. It appears, therefore, that Congress intended to diminish the reservations at the time the act was passed, and necessarily thereby to extinguish the Indian title to the part excluded. It is claimed, however, by the District Attorney, that any such intention which might be gathered from the proviso, above quoted, is rebutted by Section 9 of the act. That section declares that the United States does not guarantee to find a purchaser for the land, does not agree to buy the

land, and acts only as trustee. But a trustee has not only the legal title, but he has also the right to possession, and the fact that the Government is to act as trustee for the Indians does not indicate that their title has not been extinguished. There is nothing in Section 9 providing that if the land is not sold it shall be turned back to the Indians. The Government simply agrees to hold the money realized from the sale of the land, whenever it receives it, for the benefit of the Indians.

" * * *

"It must have been the intention of Congress by the act of 1908 to extinguish the title at some time. The question is whether, as to land not included in town sites, the intention was to extinguish the title at the time the act was passed, or at the time the proclamation of the President was issued, or at the time the homesteader entered upon the land, or at the time he had made partial payments thereon, or at the time he had made the full payment. The practical inconvenience which would result from holding that the intention was to extinguish the title at any other time than when the act was passed, or the proclamation issued, is very apparent.

"The question here concerns the relative jurisdiction of the state courts and the federal courts. It is important to definitely know over what land the state courts have jurisdiction and over what land the federal courts have jurisdiction, and to say that the Indians' right to occupy the land thus open for settlement continued until the land has been paid for, or partially paid for, would be to hold that the entryman and the Indian would have the right to occupy the same land at the same time. It would be to hold that a white person had a

> right to occupy detached portions of the land, while the Indian had a right to occupy other other detached portions thereof. In a great many cases it would be difficult, if not impossible, to determine, in such case, whether the offense was committed on a tract of land over which the United States had jurisdiction, or a tract over which the state courts had jurisdiction."

We do not deem it to be of overwhelming significance, that the Act of Congress affecting the Colville Indian Reservation does not contain the words, "thus diminished" such as is discussed in *U. S. v. La Plant, supra,* for it is the substantiative provisions of those Acts which accomplished the transformation of the character of the reservation lands and affected the diminishing of the reservations. The words, "thus diminished" make for greater ease of judicial determination, but it is the effect of the provisions of the Acts themselves which accomplished the diminishing of the reservations, and it must of necessity follow, that Congress so intended.

It is also worthy of note that in *Draper v. United States,* (8th Circ.) 248 F. (2d) 292, 295, the court held that the portion of the Pine Ridge Indian Reservation which was opened to settlement and entry had been restored to the "public domain" by the *Act of Congress* of May 27, 1910, (36 Stat. 440).

Congress has, with particularity, defined the terms, "Indian Country", in Section 1151, Tit. 18

U. S. C., and whether or not criminal jurisdiction, with some exceptions not pertinent here, is vested in federal or state courts, of necessity, requires a determination whether the location of the crime involved falls within the definition of "Indian Country".

Section 1151, Tit. 18, U. S. C., provides:

> "Except as otherwise provided in Sections 1154 and 1156 of this Title, the term, "Indian Country", as used in this Chapter, means (a) *all land within the limits of any Indian Reservation under the jurisdiction of the United States Government*, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without the limits of the state, and (c) all Indian allotments, the Indian titles to which have not been extinquished, including rights-of-way running through the same." (Emphasis supplied)

From the above quotation of Section 1151, Tit. 18, U. S. C., it is to be seen that, contained within the Legislative definition of "Indian Country", and as a part of that definition, are the words, "within the limits of any Indian Reservation under the jurisdiction of the United States Government". However, Congress has not defined the term, "Reservation", in the law relating to Criminal Jurisdiction over Indians. Therefore, in the case at bar, the determination of whether or not the *situs* of the crime was, "within the limits of any Indian Reservation

under the jurisdiction of the Unted States", must be largely determined by ascertaining whether or not Congress in the *Act of March 22, 1906,* (Appendix 44) intended to extinguish the reserved or closed character and restore to the public domain that portion of the reservation opened to settlement and entry by non-Indians.

It is to be seen by a study of the *Act of Congress of March 22, 1906,* (Appendix, § *1, 3, 5, 8, & 11*) that Congress intended to provide for the sale of all surplus, unallotted and unreserved lands within the diminished Colville Indian Reservation by vesting the Secretary of the Interior with full power and authority to accomplish this purpose. Congress could not have intended that the lands opened to settlement and entry on the Colville Indian Reservation under the general Homestead Laws, could, at the same time, be settled upon the entry made by a homesteader and, also used and occupied by the Colville Indians as a part of the Indian Reservation. The statement of the proposition of itself, manifests the inconsistency and inappropriateness of charging Congress with such a legislative intention, for a reservation certainly cannot be both "opened" and "reserved" at the same time. Therefore, in construing the plain meaning and effect of the words used by Congress in the *Act of March 22, 1906,* (Appendix 44) it seems manifest that Congress intended that the unallotted, unreserved and surplus lands of the diminished Colville Reservation be restored

to the public domain and their reserved character extinguished.

> "* * * but, if Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular situation may not have been contemplated by the legislators. * * *"
> *Barr v. United States*, 324 U. S. 83.

It is further to be observed that, in Section 3 of the *Act of Congress of March 22, 1906*, (Appendix 44, 45) Congress has provided that the lands shall be, "opened to settlement and entry under the provisions of the Homestead Laws". The Homestead Laws (§ 161-302, Tit. 43 U. S. C.) refer to the procedure and qualifications for entry and settlement upon the "public domain" or "unappropriated public lands", and, in construing the legislative intent as expressed in Section 3 of the *Act of Congress of March 22, 1906*, it is not unreasonable to presume by the reference to the Homestead Laws, Congress intended that the lands opened by that Act to settlement and entry under the Homestead Laws should be considered for the purposes of the Homestead Act as restored to the "public domain".

Prior to the year 1906, and until the year 1934, it appears that it was a policy of Congress and the Executive Branch of the United States Government to withdraw portions of reservation land, and open such land to settlement and entry by non-Indians, placing the Indians in closer proximity to non-Indian people and non-Indian communities, with the

thought in mind that such a policy would eventually lead to the beneficial result of the Indians achieving a higher degree of civilization and enabling the Federal Government to terminate its federal supervision of the Indian Nations.

> As said in *State v. Shoemaker*, 73 S. D. 120, 39 N. W. (2d) 524, 528:
>
> "• • • It has long been common knowledge that the overall policy of the Government looks toward the assimilation of its Indian wards into the body of its citizens. That which has happened and is happening was then anticipated, viz., the land comprising the reservations would pass from the hands of the Indians, and its population would shift away from the reservation. In other words, a gradual extinction of the reservations was in the contemplation of the parties."

In effectuating this purpose, the vehicle of Congress was to open portions of the reservations to settlement by non-Indians, and reserving portions for Indian use and occupancy. This purpose, and the effect to be gained, is commented upon in connection with the opening of the so-called south half of the diminished Colville Indian Reservation in *Senate Report Number 1424, 59th Congress, First Session*, in a letter by James McLaughlin, United States Indian Inspector, which letter was attached to the Senate Report. The comment extracted from that letter is as follows:

> "• • • As the Department is fully advised and have detailed information concerning the method of opening the north half under the Act of July 1, 1892, I deem it unnecessary to enter

into details at this time with reference thereto. One thing is certain, that the opening of the north half has been of material benefit to those Indians who are now residing thereon and have received allotments of land in severalty. They have good farms and are as a rule energetic and industrious and absolutely self-supporting, and I attribute this condition, to a great extent, to the fact that they have been thrown in contact with the white people who are located among them since that part of the reservation was opened. Not so with the Indians residing upon the south half of the reservation; and while it is a fact that quite a number of them are industrious, frugal, and hard working people, their condition is not, in point of civilization, to be compared with the Indians residing upon the north half, nearly all of whom I found to be in a prosperous condition and able to speak the English language intelligently. * * *"

The policy of Congress and the Executive Branch of the Government of the United States, is exemplified in the Acts of Congress opening portions of Indian Reservations to settlement and entry by non-Indians. These Acts, of their own force and effect, changed the basic concept and accepted definition of a "reservation". As was said in *United States v. Celestine*, 215 U. S. 278, 285:

"* * * But the word, 'reservation', has a different meaning, for while the body of land described in the section quoted as 'Indian Country' was a reservation, yet a reservation is not necessarily 'Indian Country'. The word is used in the land law to describe any body of land, large or small, *which Congress has reserved from sale for any purpose.* It may be a military

> reservation, or an Indian Reservation, or, indeed, one for any purpose for which Congress has authority to provide, and when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress. * * *" (Emphasis supplied)

The Acts of Congress, opening reservations to settlement and entry by non-Indians, and the continuation as reservations of those portions opened to settlement and entry by non-Indians, is in conflict with, the definitions adopted by Congress of the terms, "public lands" and "reservations" as provided in Section 796, Tit. 16 U. S. C., which provides insofar as pertinent:

> "The words defined in this section shall have the following meanings for purposes of this chapter, to wit:
>
> "(1) 'public lands' means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under the public land laws. It shall not include 'reservations', as hereinafter defined;
>
> "(2) 'reservations' means national forests, tribal lands embraced within Indian Reservations, military reservations, and other lands and interest in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interest in lands acquired and held for any public purposes; but shall not include national monuments or national parks; * * *"

Also, in *Union Pacific Railroad Company v. Harris*, 215 U. S. 386, 388, this court defined public lands as follows:

> "* * * What is meant by 'public lands' is well settled. As stated in *Newhall v. Sanger*, 92 U. S. 761, 763: 'The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws. * * *'"

It is clear that in most of the cases which are cited and extensively quoted from above, that the issues as drawn in those cases are substantially the same as are found in the case at bar. All of these cases, either directly or by implication, construed the Acts of Congress opening Indian Reservations to settlement and entry by non-Indians as having the effect of withdrawing the lands from within the limits of an Indian Reservation and vesting the state courts with criminal jurisdiction. Therefore, in accord with the authorities above noted, the respondent respectfully submits that the "*situs*" of the crime involved in the case at bar was not "within the limits of any Indian Reservation under the jurisdiction of the United States Government" nor within "Indian Country" as defined by Section 1151, Tit. 18, U. S. C., and the courts of the State of Washington were vested with jurisdiction over the crime of which the petitioner was convicted.

THE "SITUS" OF THE CRIME BEING WITHIN THE "GOVERNMENT TOWN-SITE OF OMAK", RESERVED BY SECTION 11 OF THE ACT OF CONGRESS OF MARCH 22, 1906 CANNOT BE A RESERVATION

FOR THE "FUTURE PUBLIC INTERESTS" AND ALSO AN INDIAN RESERVATION.

It has been established that the crime involved in the case at bar, was committed upon property described as Lot 9, Block 118 of the Government Town-site of Omak, which is a part of the incorporated town of Omak (R-14, 16). The town of Omak, and that portion thereof known as East Omak is separated by the Okanogan River which formerly bounded the reservation on the west side. The crime was committed in East Omak which was formed by the Government Town-site above referred to and its creation authorized by *Section 11 of the Act of Congress of March 22, 1906.* Section 11 of the *Act of Congress of March 22, 1906* (Appendix page 49) provides:

> "Nothing contained in this act shall prohibit the Secretary of the Interior from *reserving from said lands*, whether surveyed or unsurveyed, such *tracts for town-site purposes, as in his opinion may be required for the future public interests, and he may cause any such reservations, or parts thereof*, to be surveyed into blocks and lots of suitable size and disposed of under such regulations as he may prescribe, and the net proceeds derived from the sale of such land should be paid to said Indians, as provided in Sec. 6 of this act." (Emphasis supplied)

Congress has, by Sec. 11 quoted above, authorized the Secretary of the Interior to reserve tracts of land in that portion of the reservation open to settlement and entry for town-site purposes, and the section provides that the lands so

reserved, shall be a reservation for the "future public interests".

The question that arises from the provisions of Section 11. quoted above, is touched upon in the case of *United States v. La Plant*, (D. C.) 200 Fed. 92, 95 wherein the court stated on this point as follows:

> "• • • There is another element in this case which is of importance. Sec. 5 of the Act of 1908 authorizes the Secretary of the Interior 'to reserve from said lands such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause the same to be surveyed into blocks and lots.' The indictment alleges that the Secretary of Interior had designated a part of Sec. 31 on the land thus opened for sale as the town-site of Dupree, had caused it to be surveyed into blocks and lots, and that *the offense was committed on one of the lots in that town site.* It thus appears that the Secretary of the Interior had reserved this land for a town-site. *If at the same time it is to be considered a part of an Indian Reservation, it has been reserved for two purposes.* When the town-site map was filed, the streets and public places must have been dedicated to the public. Congress could never have intended that the Indian right of occupation as to those streets and public places should continue. It must be that, if the offense had been committed upon a street of this town-site, it would have been within the jurisdiction of the state courts. If it is to be said as to the lots the title was extinguished only when they have been sold and paid for, there would be difficulty in determining, in a particular case, whether an offense had been committed within the limits of a lot which had been sold and dis-

> posed of, and the title to which had been extinguished, or within the limits of an adjacent lot, which had not been sold and disposed of, and as to which the title had not been extinguished, and that difficulty would have to be overcome before it could be determined whether the state courts or the federal courts had jurisdiction. * * *" (Emphasis supplied)

Accordingly, it is the additional contention of the respondent, that the "Government Town-site of Omak", where the crime involved was committed (R 14, 16) became subject to the exercise of criminal jurisdiction by the courts of the State of Washington upon the filing of the town-site plat with the County Auditor of Okanogan County. When so filed, the lands encompassed within the town-site were dedicated to the public interests, and those lands acquired the same status that other lands possessed, which are subject to the exercise of criminal jurisdiction by the courts of the State of Washington. *United States v. La Plant, supra.*

Transmitted contemporaneously with this brief for filing, are a certified copy of the Plat of the Government Town-site of Omak, (marked respondent's Exhibit 1) and a certified copy of the original patent to Lot 9, block 118 of the Government Town-site of Omak, (marked respondent's Exhibit 2) which was the "*situs*" of the crime committed by petitioner.

ARGUMENT IN RESPONSE TO PETITIONER

Counsel for petitioner, at page 10 of his brief, places emphasis upon this court's decision in *Ash Sheep Company v. United States*, 252 U. S. 159, 166. In that case a statute was involved providing a penalty for the grazing of cattle, etc., on land belonging to an Indian or an Indian Tribe without the permission of the Indian Tribe. The *Ash Sheep Company* had grazed sheep upon lands which were on a portion of the Crow Indian Reservation in Montana, which had been opened to settlement and entry pursuant to an agreement with the Indians of the Crow Reservation which had been ratified by Congress. The lands in question had not been settled upon as a homestead under the provisions of the agreement, and the court held that during this period, and until sold under the provisions of the agreement, the Indians were entitled to the benefits of those lands. Therefore, the statute in question was applicable and the lands were defined as being Indian lands and not public lands for the purpose of the statute at issue.

The *Ash Sheep Company* case is not of value to a resolution of the issues here, for the case is not concerned with the issue of *State v. Federal Court Jurisdiction in criminal matters.* Nor does the case shed any light upon the question as to whether or not the lands in controversy continue to be "within the limits of any Indian Reservation under the jurisdiction of the United States Government," or, within

"Indian Country". The case merely stands for the proposition that the Crow Indians had a right of user over the lands opened to entry, until sold under the provisions of the special agreement ratified by Congress.

On page 13 of the petitioner's brief, counsel for the petitioner takes the position that Sec. 1 of the *Act of July 24, 1956*, 70 Stat. 626, "removes any lingering doubt that the Colville Indian Reservation continued to be Indian Country under the jurisdiction of the United States." Sec. 1 of the *Act of Congress of July 24, 1956*, 70 Stat. 626 provides:

> "That the undisposed lands of the Colville Indian Reservation, Washington, dealt with by the Act of March 22, 1906 (34 Stat. 80), are hereby restored to tribal ownership to be held in trust by the United States to the same extent as all other tribal lands on the existing reservation, subject to any existing valid rights."

The above quoted section, it would seem, does have the effect of restoring the reserved character to the undisposed lands restored to tribal ownership. However, that provision does not undo or materially change the effect upon those lands entered and settled upon under the Homestead Laws, and those reserved for townsite purposes under the *Act of Congress of March 22, 1906*, (Appendix page 44) which opened and diminished the south half of the Colville Indian Reservation.

On page 13 of the petitioner's brief, counsel quotes from Sec. 1151, Tit. 18, U. S. C., in part and places emphasis upon the words, "any patent".

The portion of the statute from which counsel quotes, is, of course, a part of the United States Code dealing with the subject of "Indians", "Indian Country", "Indian Reservations", and "Indian Crimes". Therefore, it would seem that Congress intended, in the absence of further specification, to confine those terms "any patent" to the "issuance of any patent" to an Indian. If the Congressional intent were otherwise, it might have said, the "issuance of a patent to any person" and in the absence of such a specification, those terms should be held to apply only to Indians inasmuch as the subject matter of the Act deals with "Indians", "Indian Country", "Indian Reservations" and "Indian Crimes".

In *United States v. Bowling*, 256 U. S. 484, 486 where this court discussed the methods by which the Secretary of Interior made conveyances of land to Indians, the court said:

> "* * * Before coming to the acts under which the Secretary of the Interior proceeded, it will be helpful to refer to the modes, long in use, by which Indians are prevented from improvidently disposing of allotted lands. One is to issue to the allottee a written instrument or certificate, called a trust patent, declaring that the United States will hold the land for a designated period, usually twenty five years, in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and that at the expiration of that period will convey the same to him, or his heirs, in fee, discharged of the trust and free of all charge or incumberance. The other is to issue at once to the

> allottee a patent conveying to him the land in fee and imposing a restriction upon its alienation for twenty five years or some other stated period. While alienation is effectually restricted by either mode, allotments under the first are commonly spoken of as trust allotments and those under the second as restricted allotments. As respects both classes of allotments—one as much as the other—the United States possesses a supervisory control of the land and may take appropriate measures to make sure that it inures to the sole use and benefit of the allottee and his heirs through out the original or any extended period of restriction. * * *"

On pages 14 through the top of page 16, counsel for the petitioner paraphrases and sets forth excerpts from a number of the Acts, in which Congress has made reference to the Colville Indian Reservation in one way or another.

It should be noted, on page 14 of counsel's brief, at subsection (c) thereof, that counsel for petitioner, with commendable candor, has made reference to two Acts of Congress which extend the time for making payments for lands sold under the *Act of Congress of March 22, 1906*, (Appendix page 44). In both of these Acts, reference is made to the "former Colville Indian Reservation". Additionally, some of the other Acts cited in petitioner's brief refer to the "existing reservation" where reference is made to the Colville Indian Reservation.

Although, the Acts of Congress are of value and are entitled to great weight in statutory interpretation, the definition of what an "Indian

Reservation" is, calls for judicial determination in the absence of a legislative definition of those terms in the law relating to Indians. And, in particular, the determination of whether the limits of the Colville Indian Reservation have been altered by the *Act of Congress of March 22, 1906*, (Appendix page 44) "opening" the reservation to settlement by non-Indians, and, whether such Act extinguished the reserved character of the lands settled upon, is a judicial question. Although the Acts of Congress and the opinions of the Department of Interior are entitled to great weight, they are not determinative of such issues.

> "* * * but, if Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular situation may not have been contemplated by the legislators. * * *"
> *Barr v. United States*, 324 U. S. 83.

Counsel for petitioner devotes a portion of his brief, (pages 20-28) to the discussion of cases and memoranda involving jurisdiction of federal or state courts over fee patent lands, within the limits of an Indian reservation. We submit that such cases are not appropriate to the issue of the case at bar, viz., whether the "*situs*" of the crime is "within the limits of any Indian reservation under the jurisdiction of the United States Government."

CONCLUSION

Therefore, upon the basis of the authorities and reasoning herein, the respondent respectfully submits that those lands on the Colville Indian Reservation, settled and entered upon, under the provisions of the *Act of Congress of March 22, 1906,* (Appendix page 44) and those lands reserved for town-site purposes under Sec. 11 thereof, including the "Government Town-site of Omak" are not "within the limits of any Indian Reservation under the jurisdiction of the United States Government" and are not "Indian Country", and the decision of the Supreme Court of the State of Washington should be affirmed.

Respectfully submitted,

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STEPHEN C. WAY,
Assistant Attorney General,

Counsel for Respondent.

APPENDIX

THE ACT OF CONGRESS OF MARCH 22, 1906, 34 STATUTES-AT-LARGE 80.

CHAPTER 1126—AN ACT TO AUTHORIZE THE SALE AND DISPOSITION OF SURPLUS OR UNALLOTTED LANDS OF THE DIMINISHED COLVILLE INDIAN RESERVATION, IN THE STATE OF WASHINGTON, AND FOR OTHER PURPOSES.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of unallotted lands in the diminished Colville Indian Reservation, in the State of Washington.

Sec. 2. That as soon as the lands embraced within the diminished Colville Indian Reservation shall have been surveyed, the Secretary of the Interior shall cause allotments of the same to be made to all persons belonging to or having tribal relations on said Colville Indian Reservation, to each man, woman, and child eighty acres, and, upon the approval of such allotments by the Secretary of the Interior, he shall cause patents to issue therefor under the provisions of the general allotment law of the United States.

Sec. 3. That upon the completion of said allotments to said Indians the residue or surplus lands —that is, lands not allotted or reserved for Indian school, agency, or other purposes—of the said dimin-

ished Colville Indian Reservation shall be classified under the direction of the Secretary of the Interior as irrigable lands, grazing lands, timber lands, mineral lands, or arid lands, and shall be appraised under their appropriate classes by legal subdivisions, with the exception of the lands classed as mineral lands, which need not be appraised, and which shall be disposed of under the general mining laws of the United States, and, upon completion of the classification and appraisement, such surplus lands shall be open to settlement and entry under the provisions of the homestead laws at not less than their appraised value in addition to the fees and commissions now prescribed by law for the disposition of lands of the value of one dollar and twenty-five cents per acre by proclamation of the President, which proclamation shall prescribe the manner in which these lands shall be settled upon, occupied, and entered by persons entitled to make entry thereof: *Provided*, That the price of said lands when entered shall be fixed by the appraisement, as herein provided for, which shall be paid in accordance with rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry and the balance in five equal annual installments to be paid in one, two, three, four, and five years, respectively, from and after the date of entry, and in case any entryman fails to make the annual payments, or any of them, promptly when due all rights in and to the land covered by his or her entry shall cease,

and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be reoffered for sale and entry: *Provided further*, That the lands remaining undisposed of at the expiration of five years from the opening of the said lands to entry shall be sold to the highest bidder for cash, at not less than one dollar per acre under rules and regulations to be prescribed by the Secretary of the Interior, and that any lands remaining unsold ten years after the said lands shall have been opened to entry may be sold to the highest bidder for cash without regard to the above minimum limit of price.

Sec. 4. That the said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, and enter any of said lands except as prescribed in such proclamation: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish wars, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged.

Sec. 5. That all of said lands returned and classified as timber lands shall be sold and disposed of by the Secretary of the Interior under sealed bids

to the highest bidder for cash or at public auction, as the Secretary of the Interior may determine, and under such rules and regulations as he may prescribe.

Sec. 6. That the proceeds not including fees and commissions arising from the sale and disposition of the lands aforesaid, including the sums paid for mineral and town-site lands shall be, after deducting the expenses incurred from time to time in connection with the allotment, appraisement, and sales, and surveys, herein provided, deposited in the Treasury of the United States to the credit of the Colville and confederated tribes of Indians belonging and having tribal rights on the Colville Indian Reservation, in the State of Washington, and shall be expended for their benefit, under the direction of the Secretary of the Interior, in the education and improvement of said Indians, and in the purchase of stock cattle, horse teams, harness, wagons, mowing machines, horserakes, thrashing machines, and other agricultural implements for issue to said Indians, and also for the purchase of material for the construction of houses or other necessary buildings, and a reasonable sum may also be expended by the Secretary, in his discretion, for the comfort, benefit, and improvement of said Indians: *Provided*, That a portion of the proceeds may be paid to the Indians in cash per capita, share and share alike, if, in the opinion of the Secretary of the Interior, such payments will further tend to improve the condition and advance the progress of said Indians, but not otherwise.

Sec. 7. That any of said lands necessary for agency, school, and religious purposes, and any lands now occupied by the agency buildings, and the site of any sawmill, gristmill, or other mill property on said lands are hereby reserved from the operation of this Act: *Provided*, That all such reserved lands shall not exceed in the aggregate three sections and must be selected in legal subdivisions conformable to the public surveys, such selection to be made by the Indian agent of the Colville Agency, under the direction of the Secretary of the Interior and subject to his approval.

Sec. 8. That the Secretary of the Interior is hereby vested with full power and authority to make all needful rules and regulations as to the manner of sale, notice of same, and other matters incident to the carrying out of the provisions of this Act, and with authority to reappraise and reclassify said lands if deemed necessary from time to time, and to continue making sales of the same, in accordance with the provisions of this Act, until all of the lands shall have been disposed of.

Sec. 9. That nothing in this Act contained shall be construed to bind the United States to find purchasers for any of said lands, it being the purpose of this Act merely to have the United States to act as trustee for said Indians in the disposition and sales of said lands and to expend or pay over to them the net proceeds derived from the sales as herein provided.

Sec. 10. That to enable the Secretary of the Interior to survey, allot, classify, appraise, and conduct the sale and entry of said lands as in this Act provided the sum of seventy-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, from any money in the Treasury not otherwise appropriated, the same to be reimbursed from the proceeds of the sales of the aforesaid lands: *Provided*, That when funds shall have been procured from the first sales of the land the Secretary of the Interior may use such portion thereof as may be actually necessary in conducting future sales and otherwise carrying out the provisions of this Act.

Sec. 11. That nothing contained in this Act shall prohibit the Secretary of the Interior from reserving from said lands, whether surveyed or unsurveyed, such tracts for town-site purposes, as in his opinion may be required for the future public interests, and he may cause any such reservations, or parts thereof, to be surveyed into blocks and lots of suitable size, and to be appraised and disposed of under such regulations as he may prescribe, and the net proceeds derived from the sale of such lands shall be paid to said Indians, as provided in section six of this Act.

Sec. 12. That if any of the lands of said diminished Colville Indian Reservation can be included in any feasible irrigation project under the reclamation Act of June seventeenth, nineteen hundred and two, the Secretary of the Interior is authorized to

withhold said lands from disposition under this Act and to dispose of them under the said reclamation Act, and the charges provided for by said reclamation Act shall be in addition to the appraised value of said lands fixed as hereinbefore provided and shall be paid in annual installments as required under the said reclamation Act, and the amounts to be paid for the land, according to appraisement, shall be credited to the fund herein established for the benefit of the Colville Indians.

Approved, March 22, 1906.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 62

PAUL SEYMOUR,

Petitioner,

vs.

SUPERINTENDENT OF WASHINGTON STATE PENITENTIARY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY BRIEF FOR THE PETITIONER

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I.

Congress Has Defined "Indian Country" and Has Undoubted Power to Designate Areas Which Constitute Indian Country.

Petitioner contends that the tract of land on which the crime was committed, by the plain language of 18 U.S.C. § 1151(a), was within "Indian country", despite the fact the tract had been patented in fee to a non-Indian (R. 16).[1] 18 U.S.C. § 1151 describes "Indian country" as (a) all

[1] Pet. Br. 6-7, 10-11, 20-25.

land within an Indian reservation under the jurisdiction of the federal government, notwithstanding the issuance of any patent, and including rights of way, (b) all dependent Indian communities whether within the original or subsequently acquired territory, *United States* v. *McGowan*, 302 U.S. 535, and (c) all Indian allotments, inside or outside Indian reservations, the Indian titles to which have not been extinguished, *United States* v. *Pelican*, 232 U.S. 442.

Against this simple and clear statement of the law, respondent argues at length that issuance of a fee patent to land within the borders of an Indian reservation does remove such land from "Indian country" (Resp. Br. 12-34, 42).

Respondent seems to doubt the authority of Congress to enact a statute such as 18 U.S.C. § 1151(a), but it was early determined that Congress has the power to legislate in this field. When action by Congress conferring jurisdiction on federal courts for certain crimes committed on Indian reservations within the various states was challenged, this Court said, *United States* v. *Kagama*, 118 U.S. 375, 383-84:

> It seems to us that this is within the competency of Congress. These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties

> in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

In *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565, the principle was stated in these words:

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the Judicial Department of the Government. . . .

When the power of Congress to extend the Indian liquor laws to Indian pueblos in New Mexico was challenged, *United States* v. *Sandoval*, 231 U.S. 28, 45-46, this Court said:

> Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State. . . .

Having the power to assume such jurisdiction, the federal government likewise has the power to divest itself of such jurisdiction. It has granted to the State of Washington the opportunity to assume jurisdiction over the Colville Reservation, but that state has not done so. Pet. Br. 27-28. Act of August 15, 1953, §§ 6, 7, 67 Stat. 588, 590.

Laws of 1957, c. 240 (RCW 37.12.020). Until the State of Washington assumes such jurisdiction, it remains in the federal government. *Williams* v. *Lee*, 358 U.S. 217, 220-21.

Respondent's reliance upon the nature of land titles to sustain state jurisdiction completely misses the point upon which this litigation turns.

It is true that early in our history, the test to determine what constituted "Indian country" was whether the "Indian title" had been extinguished. The Act of June 30, 1834, 4 Stat. 729, included this definition:

> all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.

Profound changes have taken place since that time, however, and the once great areas of Indian occupancy within our territorial boundaries no longer exist. All land in the United States is now embraced within the boundaries of the several states, including the reservations on which Indians still reside. Much of the land within the Indian reservations has been opened to white settlement. Still, the United States remains responsible to a large degree for the supervision of Indians living on reservations. To meet "the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country," *United States* v. *McGowan*, 302 U.S. 535, 537-38, Congress enacted a new definition of Indian country. The location of the limits or boundaries of an Indian reservation—not land titles—is now the test of

what constitutes Indian country under 18 U.S.C. § 1151 (a):

> all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, ...

The definition of "Indian country" in § 1151(a) is broad. Where Congress has deemed it advisable to restrict the definition of Indian country, it has done so. 18 U.S.C. §§ 1154 and 1156 deal with introduction and possession of liquor within "Indian country". They exclude from the definition of Indian country, for that purpose, "fee-patented lands in non-Indian communities or rights of way through Indian reservations".

For obvious reasons, respondent adopts its own definition of an Indian reservation—"an Indian reservation being commonly known to be an area of land reserved from public sale and appropriation, and dedicated to the use and occupancy of tribal Indians" (Resp. Br. 20). Respondent's definition is contrary to 18 U.S.C. § 1151. In the *McGowan* case, *supra*, this Court indicated, 302 U.S. at 539, that the important issue was whether the land had "been validly set apart for the use of Indians as such, under the superintendency of the government."[2] Once Congress establishes a reservation, all tracts within it remain a part of the reservation until separated therefrom by Congress. *United States* v. *Celestine*, 215 U.S. 278, 285. Respondent's argument overlooks the clear fact that designation of a townsite (Resp. Br. 34-38) constitutes

[2] Tribal reservations have been created in several different ways. *Federal Indian Law*, pp. 291-302. Indian property rights in the Colville Reservation derived from aboriginal possession supplemented by Executive order.

nothing more than a step preparatory to issuance of patents in fee. If issuance of a patent in fee does not remove the tract from "Indian country", then, certainly the completion of a step preliminary thereto does not do so.

The fact that Congress authorizes entry of lands within an Indian reservation under the public land laws does not remove the lands from the reservation. A single example should suffice. Forest reserves are not public lands, and yet Congress has provided that agricultural lands within forest reserves may be entered under the homestead laws. Act of June 11, 1906, 34 Stat. 233. But the existence of a homestead entry (which may ripen into a fee patent) does not remove the land from the forest reserve.[3]

We believe the entire matter is best summed up in the following words of the Supreme Court of Montana in *Irvine* v. *District Court*, 125 Mont. 398, 404, 406, 239 P.2d 272, 276:

> It seems to us that the Attorney General and the court below have placed too much emphasis on the ownership of land, and have not given due weight to the fact that the jurisdiction of the federal government over the Indian and tribes rests, not upon the ownership of and sovereignty of certain tracts of land, but upon the fact, that as wards of the general government, they are the subjects of federal authority within the state when the mentioned offense is committed as herein stipulated. . . .
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[3] See *Perko* v. *United States*, 204 F.2d 446 (C.A. 8), *cert. den.*, 346 U.S. 832, for application of federal jurisdiction over private lands within a National Forest. See, also, 18 U.S.C. § 1384, which makes certain activities outside military establishments subject to federal jurisdiction.

The fact that the federal government has alienated its fee in land or lands, by patent, which are situated within the limits of a regularly organized Indian reservation in the state does not divest it of its exclusive jurisdiction over its ward Indian, who has committed, within the limits of such an Indian reservation, one of the ten major crimes and such Indian committing such a crime is accountable only to it for the offense.

II.

Nothing Supplied by Respondent Alters the Fact That the Act of March 22, 1906, and the Presidential Proclamation of May 3, 1916, Did Not Dissolve the Colville Reservation or Change Its Boundaries.

Several cases are cited by respondent in support of the Washington Supreme Court decisions in *State ex rel. Best* v. *Superior Court*, 107 Wash. 238, 181 Pac. 688, and this case, but in each instance, the facts of the case cited distinguish it from the present case.

Among others, respondent relies heavily upon *Tooisgah* v. *United States*, 186 F.2d 93 (C.A. 10), as "supportive of the decision of the Supreme Court of the State of Washington in the instant case" (Resp. Br. 13-19). But the *Tooisgah* case does not support the holding below. This is clear from a careful analysis of the statute involved in *Tooisgah*. Phillip Tooisgah, a full-blood Apache Indian, was indicted, tried and convicted in the Western District of Oklahoma, for the murder of a full-blood Comanche Indian. The Tenth Circuit held that federal jurisdiction had been divested because Congress had decided to "disestablish the organized reservation." 186 F.2d at 98. That case involved a statute, Act of June 6, 1900, 31 Stat. 676-79, similar to the one which diminished the

Colville Reservation[4] by eliminating the north half from the reservation. Act of July 1, 1892, 27 Stat. 62.[5] Except for some allotments to members of the Colville Reservation tribes, the United States acquired all title to the north half and compensated the tribes on the Colville Reservation for that portion.[6] The north half was thereafter land outside "the limits of any Indian reservation under the jurisdiction of the United States Government, . . . " 18 U.S.C. § 1151(a). This is similar to the history of the Kiowa, Comanche and Apache Reservation involved in the *Tooisgah* case. There, the United States agreed to pay a total of $2,000,000 for a cession of 480,000 acres of the Kiowa, Comanche and Apache Reservation, 31 Stat. 676, 677. This area of the reservation, upon which the murder was committed, was therefore no longer a part of the reservation.[7]

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[4] Respondent's use of the term "south half of the diminished Colville Indian Reservation" is confusing and inaccurate (Resp. Br. 11-12 and elsewhere). A more proper and accurate term is "diminished Colville Reservation". By the Act of July 1, 1892, the north half of the Colville Reservation was vacated and restored to the public domain and was no longer a part of the reservation. What remained as the Colville Reservation was the south half—the reservation as "diminished" by operation of the Act of 1892. See Pet. Br. 4, and Appendix B. The Act of March 22, 1906, 34 Stat. 80, dealt with all of the reservation remaining after the north half was vacated and restored to the public domain by the Act of July 1, 1892, 27 Stat. 62.

[5] Pertinent portions quoted in Pet. Br. 32-33.

[6] Compensation was authorized by the Act of June 21, 1906, 34 Stat. 325, 377-78. Negotiations for a cession of the north half had been authorized by the Act of August 19, 1890, 26 Stat. 336, 355.

[7] Although not pertinent here, petitioner questions whether the the majority opinion in *Tooisgah* should have attached more weight to the fact that the allotment on which the offense was committed was an Indian trust allotment. *United States* v. *Pelican*, 232 U.S. 442. The dissenting opinion by Judge Phillips, 186 F.2d at 103, reasoned that the Act of June 6, 1900, 31 Stat. 676-79, which

The statute involved in the *Tooisgah* case was a "cession and removal" statute. The Act of 1906, involved here, constituted a "relinquishment in trust" transaction. Under the latter, the land within the exterior boundaries of the tract involved remains an Indian reservation under the jurisdiction of the United States. Pet. Br. 10.

The United States did not, by the Act of March 22, 1906, 34 Stat. 80, purchase or agree to find purchasers for the Colville Reservation lands (Pet. Br. 15-16). It agreed only to act as a trustee to handle funds paid for lands which might be purchased. § 9. There was no express or implied provision that this diminished or in any way changed the boundaries of the Colville Reservation.[8] Although the statute involved in *Tooisgah* was similar to the Act of 1892, which provided for a cession of the north half of the Colville Reservation, both differ substantially from the Act of 1906.[9]

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confirmed an agreement of October 21, 1892, "only in part disestablished the reservation created by the Medicine Lodge Treaty of 1867." In any event, both opinions agree that federal jurisdiction applies if the situs of the crime is within an "Indian reservation under the jurisdiction of the United States Government" and that an Indian reservation remains as such until or unless Congress dictates otherwise. 186 F.2d at 99, 105.

[8] Printed as an Appendix to this Reply Brief are relevant portions of H.Rept. No. 2080, 84th Cong., 2d Sess., on the bill which became the Act of July 24, 1956, 70 Stat. 626. This contains additional history of the Colville Reservation.

[9] Contrary to respondent's suggestion (Resp. Br. 19-20), Indians of North America, including the Kiowa, Comanche and Apache Tribes, were not the "fee owners" of their lands. Theirs was a right of use and occupancy which did not prevent the United States from transferring its fee without first extinguishing the Indian title, if the United States chose to do so. *Butz* v. *Northern Pacific Railroad*, 119 U.S. 55, 66. The Treaty of Medicine Lodge Creek involved in *Tooisgah* designated a reservation "for the absolute and undisturbed use of the tribes" named. II Kappler, 977, 978, Article 2. The United States retained legal title. *Johnson* v.

Application of DeMarias, 77 S.D. 294, 91 N.W.2d 480 (Resp. Br. 21), involved a burglary by an Indian on non-Indian land within the original boundaries of the Sisseton-Wahpeton Lake Traverse Indian Reservation in South Dakota. The land upon which the crime was committed, together with all other unallotted lands of the reservation, had been ceded to the United States in return for payment of a stipulated sum to the Indians. The cession was ratified by the Act of March 3, 1891, 26 Stat. 989, 1035-39, §§ 26-27, which provided, *inter alia*, that the lands ceded should be subject to the laws of the state. Any similarity in the statutes relating to the Lake Traverse and Colville Reservations applies only to the north half of the Colville Reservation (ceded by the Act of 1892) and not to the diminished ("south half") reservation dealt with in the Act of 1906.

Respondent does not "deem it to be of overwhelming significance," that the Act of 1906 affecting the Colville Reservation does not contain the words "thus diminished" utilized in the Act of May 29, 1908, 35 Stat. 460, involved in *United States* v. *LaPlant*, 200 Fed. 92, and *State* v. *Sauter*, 48 S.D. 409, 205 N.W. 25. *LaPlant* involved murder of a non-Indian by a non-Indian. Except for an unusual situation involving South Dakota, state jurisdiction would have been clear. *United States* v. *McBratney*, 104 U.S. 621; *N.Y. ex rel. Ray* v. *Martin*, 326 U.S. 496. In 1901 (Laws of 1901, c. 106), South Dakota surrendered

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M'Intosh, 8 Wheat. 543, 574, 603; *Worcester* v. *Georgia*, 6 Pet. 515, 544, 557.

The Indian tribes of the Colville Reservation established "Indian title" to the lands in the northwestern part of the State of Washington, including the lands embraced within the Colville Reservation, in a proceeding before the Indian Claims Commission and obtained a judgment against the United States for the "taking" of their lands outside the reservation. *Confederated Tribes of the Colville Reservation* v. *United States*, 4 Ind. Cl. Com. 187, 190, 199; 7 Ind. Cl. Com. 177, 208.

to the United States its jurisdiction within the limits of Indian reservations. The United States assumed jurisdiction by the Act of February 2, 1903, 32 Stat. 793. Both *LaPlant* and *Sauter* dealt with the Act of May 29, 1908, 35 Stat. 460, which authorized sale and disposition of two tracts of land of the Cheyenne River and Standing Rock Reservations in South Dakota. Section 2 of that act refers to the respective reservations as "thus diminished". The reports of the Congressional committees referred to the reservations as "diminished" and "reduced" should the bill, which became the Act of May 29, 1908, become law. S.Rept. No. 439 and H.Rept. No. 1539, 60 Cong., 1st Sess. The Act of 1908, like the Colville Act of 1906, makes the United States trustee for the Indians in sale of the lands, but there is no provision or legislative history relating to the Colville Act which shows that Congress intended to change the Colville boundaries as it did the boundaries of the South Dakota reservations.

If Congress intended to diminish the South Dakota reservations dealt with by the Act of 1908, *LaPlant* is correct. If the Act of 1908 did not change the boundaries of the South Dakota reservations, the federal court should have assumed jurisdiction.[10] *Ash Sheep Co.*, 252 U.S. 159. Aside from this, the *Sauter* case involved a crime committed on Indian-owned land, and the state court should have disclaimed jurisdiction, *United States* v. *Pelican*, 232 U.S. 442.

Putnam v. *United States*,[11] 248 F.2d 292 (C.A. 8), least of all supports the proposition that the diminished Col-

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[10] In sustaining a demurrer to the indictment, the court said, 200 Fed. at 94:

> No other meaning can be given to the words italicized ["thus diminished"] than that the reservations were diminished, and they were diminished by the act itself. . . .

[11] Cited by respondent as *Draper* v. *United States* (Resp. Br. 27).

ville Reservation was dissolved or that its boundaries were changed. *Putnam*, not a criminal case, involved the Act of May 27, 1910, 36 Stat. 440, dealing with a designated part of the Pine Ridge Reservation in South Dakota. The Act is in all material respects similar to the act involved in *LaPlant* and *Sauter*. The court concluded that the geographic boundaries of the Pine Ridge Reservation had not been changed. The statement in the portion of the opinion of the district court, quoted by the court of appeals, 248 F.2d at 295, to the effect that the reservation would "be diminished in size" through settlement by non-Indians is dictum. That case involved only the validity of deeds to trust allotments where the owner of the fee title did not join in the conveyance. The dictum is contrary to *Ash Sheep Co.* v. *United States, supra*.

We reiterate that none of the cases cited by respondent warrants a conclusion that the Act of March 22, 1906, 34 Stat. 80, dissolved the diminished Colville Reservation or changed its boundaries. Since the passage of that act, Congress and the Executive have continued to recognize that the Colville Reservation has retained the same geographic boundaries since 1892. Pet. Br. 13-20.

Conclusion

It is respectfully submitted that the ruling of the Supreme Court of the State of Washington is erroneous. It should be reversed and that court instructed to grant petitioners' application for a writ of habeas corpus.

Respectfully submitted,

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APPENDIX

House Report No. 2080, 84th Cong., 2d Sess.:

RESTORING TO TRIBAL OWNERSHIP CERTAIN LANDS UPON THE COLVILLE INDIAN RESERVATION, WASH., AND FOR OTHER PURPOSES

* * * * *

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 7190) restoring to tribal ownership certain lands upon the Colville Indian Reservation, Wash., and for other purposes having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

* * * * *

EXPLANATION OF THE BILL

H.R. 7190, as amended, introduced by Congressman Magnuson, is fourfold in purpose. First, it restores to the Confederated Tribes of the Colville Reservation 818,000 acres of undisposed of ceded lands; second, it provides that in order to effect tribal land consolidation in Ferry and Okanogan Counties in the State of Washington, the Secretary of the Interior may sell or acquire through purchase, exchange or relinquishment lands or other interests in lands, water rights or surface rights within the boundaries of the reservation; third, it provides for submission by the tribe, within 5 years from the date of enactment of this act, proposed legislation providing for the termination of Federal supervision over the property and affairs of the Colville Confederated Tribes within a reasonable period of time thereafter; and, finally, it ratifies and approves an agreement entered into by the Colville Tribe and Okanogan and Ferry Counties on April 21, 1954. This agreement provides that the Colville Tribes, in lieu of payment of taxes, will pay the sum of $40,000 per year to the two named counties to defray a proportionate share of current administrative and road costs expended by the counties on behalf of the Colville Indians.

History of the Land Problem

The Colville Reservation was established by Executive order of July 2, 1872. The original reservation comprised an area of approximately 2,886,000 acres. In 1892 an area of approximately 1,500,000 acres in the northern half of the reservation was restored to the public domain, as a result of an agreement of May 9, 1891, between the representatives of the tribes and the United States. This agreement provided for the cession of the northern half of the reservation—1,500,000 acres—for the maintenance of a school and mill on the diminished reservation, for the allotment of 80-acre farms on the ceded part of the reservation to those Indians who desired, for the payment of $1,500,000, and for the relinquishment of all right, title, and interest to the northern portion of the reservation. Prior to opening this area to settlement 660 Indians were allotted a total of 51,653 acres, or an average of 78.3 acres each. The balance of the area was open to settlement under the laws applicable to disposition of public lands in the State of Washington. Each entryman was required to pay $1.50 per acre for land homesteaded, in addition to the required fee. These proceeds were set aside for the benefit of the Indians. Subsequent legislation created the Colville National Forest which is comprised of about 760,000 acres of the undisposed lands in the northern half of the reservation.

On December 1, 1905, a disputed majority of the Colville tribal members by agreement with James McLaughlin, United States Indian inspector, on behalf of the Federal Government relinquished all right, title and interest of the Indians to the lands embraced within the reduced Colville Indian Reservation provided that allotments of lands of 80 acres each were made to every man, woman and child belonging to or having tribal rights on the reservation. The McLaughlin agreement also contained the condition that the Indians would be paid for the northern portion of the reservation, containing approximately 1,500,000 acres, which had been vacated and restored to the public domain by the act of July 1, 1892, and that the Indians would receive $1,500,000 in full satisfaction of the 1891 agreement.

Some Colville Indians feel that their forefathers were badly informed by the Federal Government, probably through misunderstandings in the McLaughlin case, when they negotiated the 1905 agreement which stipulated that payment for the northern half of their reservation was contingent upon their signing away additional portions of their diminished land base. The Colvilles lay no claim to the northern half of the total reservation (although it was ceded to them) but they want a clarification of their rights and property holdings in the diminished area which was opened to settlement in 1916 but was withdrawn by Executive order in 1934.

The 818,000 acres in question are the undisposed of lands of the Colville Reservation authorized to be classified and open to public entry by the act of March 22, 1906 (34 Stat. 80). Subsequently, by Presidential proclamation of May 3, 1916 (39 Stat. 1778) there was opened for entry the irrigable, grazing and arid lands within the area. The lands classified as mineral acres were subject to location and disposal under the mineral-land laws of the United States. These lands were temporarily withdrawn from all forms of entry and disposition by departmental order of September 19, 1934, with a view to restoring them to tribal ownership under the Indian Reorganization Act of 1934 (IRA). However, since the Colville Indians excluded themselves from IRA, the restoration of the lands to tribal status may be accomplished only by congressional authority.

H.R. 7190, as amended, would restore these 818,000 acres to tribal ownership subject to any existing valid rights and would provide a means for consolidation of Indian and non-Indian holdings on the reservation within Okanogan and Ferry Counties through purchase, exchange or relinquishment. There appears to be little question as to the desirability and necessity of the restoration of the lands in order to provide economic security to the Colvilles through the continuance and expansion of their cattle and timber industries within the reservation. It is estimated that 97 percent of the tribal income is derived from these lands. It should be remembered that although the tribe

has had control of these lands for years, because of the lack of its outright ownership the Indians have not felt free to establish fully an economic base. Restoration will have the additional important beneficial result of permitting mineral exploration and development of this land.

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UNITED STATES DEPARTMENT OF THE INTERIOR,

OFFICE OF THE SECRETARY,
Washington, D.C., July 20, 1955.

HON. CLAIR ENGLE,

Chairman, Committee on Interior and Insular Affairs, House of Representatives, Washington, D.C.

MY DEAR MR. ENGLE: Your committee has requested a report on H.R. 6154, a bill restoring to tribal ownership certain lands upon the Colville Indian Reservation, Wash., and for other purposes.

We recommend that the bill be enacted if it is amended as suggested below.

The lands proposed for restoration are approximately 818,000 acres, being the "opened" undisposed of lands of the diminished Colville Reservation, authorized to be classified and opened to public disposition by the act of March 22, 1906 (34 Stat. 80). The Presidential proclamation of May 3, 1916 (39 Stat. 1778), opened for entry only the irrigable, grazing and arid lands within the area. The lands classified as mineral lands were subject to location and disposal under the mineral-land laws of the United States. By departmental orders of September 19, 1934, and November 5, 1935, all these lands were temporarily withdrawn from further disposition through entry or sale, until the matter of their restoration to tribal ownership could be given appropriate consideration.

The act of March 22, 1906, was based upon the agreement of December 1, 1905. This agreement provided for allotments of 80 acres to each man, woman, and child belonging to or having tribal rights on the Colville Indian Reservation, and required that they cede, grant and relinquish to the United States all the right, title, and interest

they had to all other lands embraced within the so-called diminished Colville Indian Reservation. The proceeds of the sale of these ceded lands by the United States were, however, to be paid to the Indians. It is clearly evident now that the alloted lands will not support the Indian population of the reservation.

The undisposed of ceded lands, including approximately 475,000 acres classified as timberlands, are widely scattered over the entire reservation. For a number of years the Indians have been requesting that these lands be restored to them to provide a secure economic base which they might develop. H.R. 6154 would restore these lands to tribal ownership, subject to any existing valid rights, and provide a means for consolidation of Indian and non-Indian holdings on the reservation within Ferry and Okanogan Counties, Wash., through purchase, exchange, and relinquishment.

"Justification for restoration 'opened' lands diminished portion reservation" was enclosed with our report dated May 10, 1951, on H.R. 2387, 82d Congress. This justification discloses that the economic security of the Colville Indians requires the expansion of the cattle industry and the continuance of a permanent timber industry on the reservation; that the expansion of both of these industries is dependent on the restoration of a tribal status of the undisposed of "opened" lands; and that 97 percent of the tribal income is derived from these lands. The further expansion of these industries will aid the economic improvement of many Colville Indians, including those who served in the Armed Forces during the recent war. The tribe has had control of these lands, the same as tribal lands, over a long period of years, and has used the income therefrom for tribal purposes.

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ORME LEWIS,
Assistant Secretary of the Interior.

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